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## **Information Submitted under Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

concerning Italy's responsibility for the torture of migrants pulled back to Libya

*States and the ICC-Prosecutor should examine whether investigations for crimes against humanity or war crimes are warranted in view of the scale, gravity and increasingly systematic nature of torture, ill-treatment and other serious human rights violations ... as a direct or indirect consequence of deliberate State policies and practices of deterrence, criminalization, arrival prevention, and refoulement (emphasis added).*<sup>1</sup>

Prof. Nils Melzer, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

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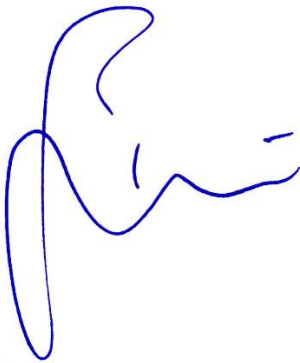
<sup>1</sup> Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 26 February 2018, quoted in: Itamar Man et al., 2018, *EJIL: Talk!*; <https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/>.

The *Centre Suisse pour la Défense des Droits des Migrants* (CSDM)<sup>2</sup> is a non-profit organization with a mandate to promote respect for the fundamental rights of migrants through advocacy before international instances such as the United Nations Treaty Bodies and the European Court of Human Rights.

The CSDM submits the present information under Article 20(1) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and invites the Committee against Torture to open an inquiry into Italy's practice of pull-backs by proxy in the Central Mediterranean, a practice that results in the systematic torture of refugees and migrants returned to Libya.

Geneva, Switzerland 25 June 2020

Respectfully submitted,



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<sup>2</sup> For further information see [www.centre-csdm.org](http://www.centre-csdm.org).

***“We will create a Libyan system capable of stopping migrants before they reach international waters. As a result it will no longer be considered a push-back because it will be the Libyans who will be rescuing the migrants and doing whatever they consider appropriate with the migrants.”***

Italian Admiral Enrico Credendino, in an interview for the Italian magazine *Internazionale*<sup>3</sup>

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<sup>3</sup> The video is available at <https://www.internazionale.it/video/2017/05/04/ong-libia-migranti> (accessed on 30 November 2018). The quotation starts at 3’51”.

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## LIST OF ABBREVIATIONS

AI	Amnesty International
ASR	International Law Commission Articles on State Responsibility
CAT	United Nations Convention against Torture, Inhuman or Degrading Treatment or Punishment
CoE	Council of Europe
Committee	United Nations Committee against Torture
CPTA	Temporary stay and assistance centre (Italy)
DCIM	Libya's General Directorate for Combating Illegal Migration
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EUTF	EU Emergency Trust Fund for Africa (also EUTFA)
ENI	European Neighbourhood Instrument
EU	European Union
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GC	General Comment (of the Committee)
GNA	Libyan Government of National Accord
HRW	Human Rights Watch
ICJ	International Court of Justice
IMO	International Maritime Organization
IOM	International Organization for Migration
LCG	Libyan Coast Guard
MoU	Memorandum of Understanding
MRCC	Maritime Rescue Coordination Centre
MSF	Doctors Without Borders
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
SAR	Search and Rescue
UNSMIL	United Nations Support Mission in Libya
UN	United Nations

***“Returning those people is like condemning them to hell.”***

Italian Deputy Minister of Foreign Affairs Mario Giro, said  
referring to migrants escaping from Libya<sup>4</sup>

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<sup>4</sup> Mario Giro, Deputy Minister of Foreign Affairs, Italy, 6 August 2017, quoted in: Marco Menduni, 6 August 2017, “Giro: ‘Fare rientrare quelle persone vuol dire condannarle all’inferno’ ”, *La Stampa*; <https://www.lastampa.it/2017/08/06/italia/giro-farerientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzfFI7fNGFCMADN/pagina.html>, accessed 31 May 2019.



## KEY FINDINGS

- On Italy's behalf, the Libyan Coast Guard (LCG) intercepts and pulls back refugees and migrants who are fleeing horrific abuses in Libya by crossing the Central Mediterranean. In Libya, these refugees and migrants are indefinitely detained in formal and informal centres where they are systematically tortured.
- The LCG was re-created by Italy under the framework of a bilateral cooperation agreement known as the Memorandum of Understanding. Under the MoU, Italy has provided funds, naval vessels and training to the LCG for the specific purpose of outsourcing pull-backs to Libya. Italy maintains complete operational control over the LCG and directs LCG operations through real-time surveillance and intelligence sharing, both directly and through its EU partners.
- Italy is responsible for violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment suffered by refugees and migrants pulled back to Libya because it is exercising *de facto* control over them, triggering the extraterritorial application of the CAT. These circumstances warrant the opening of an urgent inquiry procedure for a systematic practice of torture under Article 20.

## **EXECUTIVE SUMMARY**

### Introduction

1. On the basis of the information provided in this submission, we invite the United Nations Committee against Torture to launch an inquiry procedure under Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, relating to Italy's conduct in the Central Mediterranean.
2. Italy is operating a programme of massive pull-backs of refugees and migrants to Libya, through the Libyan Coast Guard (LCG). In Libya, these refugees and migrants are subjected to systematic torture. We submit that Italy's obligations under the Convention against Torture (CAT) are engaged because of the extent of Italy's control over the LCG.
3. The LCG is nominally a state authority of the UN-backed Libyan Government of National Accord (GNA). However, as demonstrated in this submission, the LCG is in fact acting as a proxy for Italy, which re-created it after it was destroyed in the civil war of 2011, for the specific purpose of preventing refugees and migrants from reaching Italian territory.
4. The comprehensive cooperation between Italy and Libya in the Central Mediterranean is governed by a bilateral treaty, the Memorandum of Understanding (MoU), which posits the "stemming of illegal migration" as one of its main objectives. The reconstruction of the LCG and other migration control structures was accomplished under the framework of the MoU.
5. On Italy's behalf, the LCG intercepts and pulls back refugees and migrants who are fleeing horrific abuses in Libya in the hopes of reaching safety in Europe. Without Italian resources – funds, ships, training and command and control structures – the LCG would not be able or willing to intercept persons in its search and rescue zone. Italy maintains complete operational control over the LCG and directs its pull-back operations through real-time surveillance and information sharing with its Libyan partners, directly and through EU.
6. We submit that, under circumstances where a State party such as Italy is exercising extraterritorial control over persons pursuant to an agreement with a foreign country, that State party is exercising its jurisdiction and can be held accountable under the CAT.

7. We urge the Committee to investigate Italy's role in the Central Mediterranean as a matter of great urgency because the torture we describe in this submission is continuing unabated.

### The Facts

8. There is extensive evidence of widespread and systematic violations of the human rights of refugees and migrants in Libya. These violations include torture, summary executions, arbitrary and indefinite detention, sexual and gender-based violence, slavery and forced labour, all of which have been documented by relevant United Nations bodies and international NGOs.
9. Many refugees and migrants have attempted, and continue to attempt, to escape Libya to reach safety in Europe. Many of them are persons in need of international protection, Libya being only a transit country on a longer journey. The majority have endured unspeakable brutalities before attempting the desperate journey across the Mediterranean. A German diplomat based in Niamey, Niger, described the conditions in migrant detention centres in Libya as "concentration camp-like" in an internal diplomatic cable to Chancellor Angela Merkel. He stated that "[e]xecutions of migrants who cannot pay, torture, rapes, blackmail and abandonment in the desert are the order of the day there."<sup>5</sup>
10. From Libya, the primary route to reach Europe is by boat to Italy. These journeys are usually undertaken with substandard vessels lacking in minimum safety measures, which has resulted in thousands of fatalities, making Europe's Mediterranean border the deadliest in the world.
11. Until the end of 2014, the response of the Italian government towards migrants crossing the Mediterranean was focussed on search and rescue operations (SAR). From October 2013 to October 2014, Operation Mare Nostrum deployed units from the Italian Navy and Air Force, including sea vessels, submarines, planes and helicopters to cover a 70,000 km<sup>2</sup> territory in the Mediterranean including rescue zones in Italian, Libyan and Maltese waters. Over the course of its operation, Mare Nostrum ran 421 missions and rescued over 170,000 migrants.

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<sup>5</sup> German diplomat stationed in Niger in an internal cable to Angela Merkel, 29 January 2017, quoted in: Deutsche Welle, 2017, "Libyan Trafficking camps are hell for refugees, diplomats say"; <https://p.dw.com/p/2WaEd>.

12. Operation Mare Nostrum was terminated by the Italian government, citing budgetary constraints and a lack of assistance from other European governments in the reception and hosting of rescued migrants. The large influx of migrants to Italy during the “migration crisis” years 2015-16 also stoked anti-immigrant sentiment, which was exploited successfully by right-wing political forces ready to define a new migration agenda for Italy.
13. After termination of Operation Mare Nostrum, the Italian government’s role in relation to the crossings from Libya changed significantly to one of prevention and deterrence. **The most significant aspect of this change was the outsourcing of border control to Libya.**
14. In the *Hirsi Jamaa and Others v. Italy* judgment, the European Court of Human Rights (ECtHR) established that *refoulement* to Libya constituted a violation of the prohibition of torture and inhuman or degrading treatment (Art.3), and breached the prohibition of collective expulsion (Art. 4 of Protocol No. 4) and the right to an effective remedy (Art. 13) because of the conditions awaiting migrants in Libya.
15. After *Hirsi* it was no longer possible for Italy to use its own navy to intercept and *refoule* migrants in the Mediterranean without openly violating international law. Italy needed someone else to do this for them. Concretely this meant that the job needed to be outsourced.
16. In the civil war following the fall of the Gaddafi regime, most state structures in Libya had been destroyed. Due to the absence of functioning institutions, Italy’s new policy of outsourcing border control required the Italians to re-create the LCG and to take command of its operations. With sustained Italian assistance, the LCG would eventually be able take control of its own SAR zone and operate autonomously. Italy also had to fund the building of migrant detention centres where the intercepted refugees and migrants could be held on Libyan soil after being pulled back.
17. With these objectives in mind, in 2017, a Memorandum of Understanding (MoU) was agreed between the Italian Government and the GNA, the primary purpose of which was “stemming illegal migration”.<sup>6</sup> The MoU was enthusiastically endorsed by the European Union (EU) in its Malta Declaration of 3 February 2017, where it pledged support for Italy

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<sup>6</sup> For a discussion of the Italy-Libya MoU, see Anna Liguori, *Migration Law and the Externalisation of Border Controls, European State Responsibility*, Routledge 2019.

in the implementation of the agreement. The EU followed up by disbursing over € 90 million for the benefit of Libyan authorities through its implementing partner, the Italian Ministry of the Interior.<sup>7</sup>

18. In the MoU, Italy agreed to provide technical and financial assistance to Libyan authorities, including by funding reception centres for migrants and training Libyan personnel. Following the agreement, the Italian Government supplied funds, equipment and training to the LCG, including boats and surveillance technology. The Italian government also set up a floating Maritime Rescue Coordination Centre (MRCC) on an Italian navy ship stationed in the harbour in Tripoli to coordinate the LCG's SAR activities. To this day, the Libyan authorities have no autonomous capacity to locate and intercept migrant boats on the Mediterranean, but depend entirely on Italian assistance, directly and through the EU.
19. **Since the MoU was agreed, approximately 40,000 individuals have been intercepted by the Libyan Coast Guard and pulled back to Libya.** At the same time, migrant arrivals on Italian shores have declined dramatically.
20. In parallel to orchestrating this massive pull-back operation, the Italian government conducted a campaign to obstruct independent SAR operations in the Mediterranean. With the shutdown of Mare Nostrum NGO rescue boats had begun operating to fill the vacuum, and the Italian Government decided that their activities needed to be stopped because they risked undermining the strategy of pull-backs by proxy.
21. On 14 June 2019, Italy passed an emergency decree, criminalising NGO SAR operations through the imposition of severe fines on vessels for every migrant rescued at sea, as well as threatening them with having their licences revoked or suspended and boats confiscated. The decree was definitively approved and passed into law by the Italian senate on 5 August 2019. Several independent SAR operations have since been prevented from disembarking at Italian ports and charged by Italian prosecutors with allegedly facilitating illegal migration.
22. Migrants intercepted by the LCG and returned to Libya are subject to detention under Libyan law which considers illegal entry, stay and exit to constitute criminal offences.

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<sup>7</sup> European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa (EUTF), specifically the Support to Integrated Border and Migration Management in Libya (IBM). The IBM programme funding was disbursed in two tranches, in July 2017 and December 2018.

Libya is not a party to the 1951 Refugee Convention and does not recognise the right to asylum. Therefore, persons in need of international protection have no means of having their eligibility for asylum determined or of regularising their status in any other way.

23. In reality, refugees and migrants who are pulled back are not charged with offences under the law, but are simply detained, arbitrarily and indefinitely, in one of 20 detention centres operated by the General Directorate for Combating Illegal Migration (DCIM) or in an informal centre. There is extensive evidence that detainees in these centres are subject to extreme violence including torture, rape and forced labour, both by Libyan authorities and by armed groups that have access to the centres.
24. The European Union has so far allocated € 408 million to Libya via the European Union Emergency Trust Fund for Africa (EUTF). The stated purpose of the fund is to support a migration management and asylum system in Libya that is consistent with international standards and human rights. However, evidence has shown that the funds have not prevented the widespread continuation of human rights abuses throughout the country and have in fact been channelled to the very authorities that are responsible for those human rights violations.
25. Due to the fact that the violations of refugees' and migrants' rights are ongoing, there are continuing demands for pull-backs to Libya to cease immediately. In a statement on 19 February 2020, the International Organization for Migration (IOM) called for the international community, including the EU, to urgently find alternative disembarkation mechanisms for migrants fleeing from Libya.
26. This demand has been echoed by the United Nations High Commissioner for Refugees (UNHCR) who has repeatedly stated that Libya is not a safe country for disembarkation. Numerous NGOs such as Amnesty International and Human Rights Watch have also provided evidence that the Italian government's assistance to the LCG is directly facilitating the gross violations of migrants' human rights.
27. Despite the overwhelming evidence of human rights abuses, the Italian government recently renewed the MoU with Libya for a further three years with effect from 2 February 2020. The renewed MoU makes no amendment to the original and imposes no additional conditions on the Libyan GNA with respect to migrants' human rights. The Italian

government will therefore continue to provide support to the LCG and the DCIM to intercept migrants in the Mediterranean, force their return to Libya and detain them.

### The Law

28. In view of the numerous reports referenced here, we consider it established that the information presented concerning the torture of refugees and migrants is “reliable” within the meaning of Article 20 of the CAT. We also consider it established that the practice we describe, in respect of refugees and migrants, amounts to “torture” under the definition of Article 1 of the CAT. Finally, due to the fact that the torture is routine and recurring across all formal and informal detention centres for migrants in Libya, we consider it uncontroversial that it constitutes “systematic practice” for purposes of Article 20.
29. The Article 20 procedure permits an inquiry for the systematic practice of torture “in the territory of a State party”. The word “territory” must be understood as a jurisdictional term encompassing extraterritorial conduct when the State party is exercising control over persons outside its borders.
30. In particular, the Committee, in line with other international human rights instances, has adopted an extraterritorial approach to jurisdiction in situations where a State Party exercises *de facto* control over persons outside its national borders. It has specifically found that a State party exercises *de facto* control in the context of migrant interdictions at sea in situations where it is sharing responsibility for the fate of the migrants with a foreign state on the basis of a bilateral agreement concluded for this purpose (see *J.H.A. v. Spain*, (Marine I) § 8.2, referring to General Comment no. 2 § 16). In these circumstances, a State party is exercising jurisdiction over the interdicted persons and can be held responsible for violations of the CAT.
31. In *J.H.A.* the Committee recalled that “the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control ...” and that “[t]his interpretation of the concept of jurisdiction **is applicable in respect not only of article 2, but of all the provisions of the Convention**, including article 22” (*J.H.A.* at § 8.2, our emphasis).
32. In line with the Committee’s reasoning, we submit that:

- 1) Italy is responsible for violations of the CAT suffered by refugees and migrants pulled back to Libya because it is exercising *de facto* control over them through the LCG, and
- 2) the Committee has the power to inquire into this situation under Article 20 because the notion of extraterritorial jurisdiction extends to the inquiry procedure under that provision.

33. We demonstrate below that, as a result of the comprehensive and multi-pronged support provided to the Libyan authorities, Italy exercises overall strategic control over the LCG, which operates as their proxy in the Central Mediterranean for the purpose of intercepting and pulling back refugees and migrants. This is accomplished within the framework of a bilateral treaty for cooperation in the area of migration control – the MoU – which posits the stemming of “illegal migration” as one of its main objectives.

34. In light of the foregoing, we submit that the control exercised by the Italians over the LCG’s operations is sufficient to trigger jurisdiction under the CAT and to justify an inquiry procedure for systematic torture.

35. In addition to arguments arising under the Committee’s concept of extraterritorial conduct, we also discuss how Italy can be held accountable through breaches of its positive obligations to prevent torture and, alternatively, under customary international law for breaches of peremptory norms as enshrined in Articles 40-41 and Article 16 of the International Law Commission’s Articles on State Responsibility for Internationally Wrongful Acts.



## THE FACTS

### A. Background to migration across the Mediterranean from Libya to Italy

36. For decades, there has been irregular migration across the Mediterranean to Europe. The International Organization for Migration (IOM) estimates that more than 2.5 million migrants have crossed the Mediterranean in an unauthorized fashion since the 1970s.<sup>8</sup> The countries of origin, demographic detail and reasons for crossing are diverse and have evolved over time.
37. The routes used for arrival in Europe may be broadly categorised into the Western route for those arriving in Spain, the Central route for those arriving in Italy, and the Eastern route for those arriving in Greece. In relation to the Central route, there were just over a million unauthorized entries by sea to Italy from 1998 to 2017, with a significant escalation in 2014 and onwards, primarily attributable to migratory pressures in sub-Saharan Africa.<sup>9</sup>
38. The departure point for irregular migration to Italy from 2003 to 2010 was generally Tunisia, entering Italy through the Strait of Sicily.<sup>10</sup> Departure from Tunisia became more difficult after Tunisia adopted legislation criminalizing irregular exit.
39. With the sharp deterioration in security in the aftermath of the Libyan conflict in 2011, Libya has since become the main departure point for irregular migration to Italy. The journey across the Mediterranean from Libya to Italy takes between 2 and 3 days and is often facilitated through use of substandard vessels that are unsafe, which has contributed to a large number of fatalities at sea.
40. The exact number of deaths of migrants and refugees crossing from Libya to Italy is unknown. However, the UNHCR estimates that in the past 5 years, 15,000 people have lost their lives in the Central Mediterranean alone, and it can be assumed that this is a significant underestimate considering that it does not include unaccounted-for deaths.<sup>11</sup> Europe's Mediterranean border is by far the deadliest in the world.

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<sup>8</sup> IOM, "Four Decades of Cross-Mediterranean Undocumented Migration to Europe", 2017, p.4; [https://publications.iom.int/system/files/pdf/four\\_decades\\_of\\_cross\\_mediterranean.pdf](https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf).

<sup>9</sup> Ibid., p.11.

<sup>10</sup> Ibid., p.10.

<sup>11</sup> Data on missing and dead persons from UNCHR between 2015 and 2020: <https://data2.unhcr.org/en/situations/mediterraneanInternational>; see also IOM, "Calculating 'Death Rates' in

## **B. Background to Italian and EU Search & Rescue operations**

41. In an effort to secure the safety of migrants crossing the Mediterranean, the Italian government established Operation Mare Nostrum (hereafter ‘Mare Nostrum’), Latin for “Our Sea”, a naval and air search and rescue operation run across the Southern Mediterranean Sea.<sup>12</sup>
42. Mare Nostrum began on 18 October 2013 and was terminated on 31 October 2014. It was launched and run by the Italian government following two deadly boat capsizes off the coast of the Italian island of Lampedusa, resulting in the deaths of over 600 migrants,<sup>13</sup> and a general increase in migrants attempting to cross the Mediterranean to Europe, particularly since 2000.<sup>14</sup>
43. The express purpose of Mare Nostrum was to search for those at risk of drowning in the Mediterranean Sea and rescuing them, as well as arrest and detain any smugglers identified in the process.<sup>15</sup> Mare Nostrum deployed units from the Italian Navy and Air Force, including sea vessels, submarines, planes and helicopters.<sup>16</sup> The search and rescue area included international waters, in particular the search and rescue zones of Italy, Libya and Malta, and spanned 70,000 km<sup>2</sup> (27,000 square miles).<sup>17</sup>
44. Boats carrying migrants across the Mediterranean sinking or at risk of sinking were intercepted, and migrants were taken on board Italian vessels and given medical assistance by shipboard medical staff, doctors of the Sea and Air Border Health Department, personnel of the Military Corps and Voluntary Nurses of the Italian Red Cross, and

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the Context of Migration Journeys: Focus on the Central Mediterranean”;  
<https://publications.iom.int/system/files/pdf/mortality-rates.pdf>.

<sup>12</sup> Marina Militare - Ministero Della Difesa, “Mare Nostrum Operation”, 2018;  
<http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>.

<sup>13</sup> The Guardian, “Italy: end of ongoing sea rescue mission puts thousands at risk”, 31 October 2014;  
<https://www.theguardian.com/world/2014/oct/31/italy-sea-mission-thousands-risk>; Yahoo News, “Italy ignores pleas, ends boat migrant rescue operation”, 31 October 2014; <https://news.yahoo.com/italy-confirms-end-boat-migrant-rescue-op-mare-142437512.html?guccounter=1>; see also reports from other major news outlets such as the BBC.

<sup>14</sup> IOM, 2017, op. cit., p.1; p.13 (figure 3.1).

<sup>15</sup> Marina Militare - Ministero Della Difesa, 2018, op. cit.

<sup>16</sup> Ibid.

<sup>17</sup> European Political Strategy Centre, “Irregular Migration via the Central Mediterranean: From Emergency Responses to Systemic Solutions”, 2 February 2017, p.3;  
[https://ec.europa.eu/epsc/sites/epsc/files/strategic\\_note\\_issue\\_22\\_0.pdf](https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pdf).

voluntary medical personnel of the Order of Malta's Italian Relief Corps and Francesca RAVA Foundation.<sup>18</sup>

45. On-board migrant identification procedures were also undertaken by personnel from the Italian Department of Public Security, Centre Directorate for Immigration, and Border Police.<sup>19</sup> The rescued migrants were taken to Italian shores where they were then given access to pre-existing channels and programmes for asylum seekers. Overall, Mare Nostrum ran 421 missions and rescued over 170,000 migrants in its one year of operation.<sup>20</sup>
46. Mare Nostrum was driven and funded by Italy and cost Italy € 9 million per month to run.<sup>21</sup> In total, the Italian government spent approximately € 114 million on the operation.<sup>22</sup> Despite its appeals to the EU for support, Italy received very little financial or operational support for Mare Nostrum. The EU provided Italy with € 1.8 million in financial support from the Emergency Actions part of its External Borders Fund,<sup>23</sup> and Slovenia provided the support of one vessel and crew for two months.<sup>24</sup>
47. Throughout 2014, Italy raised concerns about the ongoing costs of running Mare Nostrum, and increased its requests to the EU member states to help share the costs and responsibility for rescuing Mediterranean boat migrants.<sup>25</sup> Over time, as its appeals to the EU for support

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<sup>18</sup> Marina Militare - Ministero Della Difesa, 2018, op. cit.

<sup>19</sup> Ibid.

<sup>20</sup> European Political Strategy Centre, 2 February 2017, op.cit., p.3, figure 1.

<sup>21</sup> For varied cost breakdowns across sources, see: Reuters, "Italy in talks with EU to share responsibility for boat migrants", 8 July 2014; <https://www.reuters.com/article/us-eu-italy-migrants/italy-in-talks-with-eu-to-share-responsibility-for-boat-migrants-idUSKBN0FD1YL20140708>; The Washington Post, "Italy ran an operation that saved thousands of migrants from drowning in the Mediterranean. Why did it stop?", 20 April 2015; <https://www.washingtonpost.com/news/worldviews/wp/2015/04/20/italy-ran-an-operation-that-save-thousands-of-migrants-from-drowning-in-the-mediterranean-why-did-it-stop/>.

<sup>22</sup> Yahoo News, 31 October 2014, op.cit.

<sup>23</sup> European Commission, "Frontex Joint Operation 'Triton' Concerted efforts to manage migration in the Central Mediterranean", 7 October 2014; [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_14\\_566](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_566).

<sup>24</sup> Radiotelevizija Slovenija, "Triglav Ship nearing end of mission", 22 January 2014; <https://www.rtvlo.si/news-in-english/triglav-ship-nearing-end-of-mission/327985>.

<sup>25</sup> EU Observer, "EU migrant mission will not replace Mare Nostrum", 3 September 2014; <https://euobserver.com/justice/125456>.

went unmet, Italy stopped taking fingerprints of migrants not intending to stay in Italy as required by the Dublin Convention so as to avoid a record of Italy as the point of arrival.<sup>26</sup>

48. Despite the success of Mare Nostrum in securing the safety of migrants and refugees crossing the Mediterranean, it was terminated on 31 October 2014. Italy gave a number of reasons for its decision, including that it had been intended as a temporary emergency solution from the outset, and that Italy was unable to shoulder the cost of continuing to run the operation, particularly against the backdrop of a recession it had been facing for the previous three years.<sup>27</sup>
49. Another reason cited for the end of Operation Mare Nostrum was that Mare Nostrum became an “unintended pull factor”, encouraging more migrants and refugees to attempt to cross the Mediterranean;<sup>28</sup> further, that smugglers used less safe vessels for the crossing due to the increased likelihood that those on board would be saved.<sup>29</sup>
50. Operation Mare Nostrum was superseded by the EU-run ‘Operation Triton’ (hereafter referred to as ‘Triton’) commencing on 1 November 2014. Triton was operated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, known as ‘Frontex’.
51. Triton combined efforts and resources from a number of EU states, and concluded in 2018. The express purpose of Triton was the protection of borders, as opposed to search and rescue, and was originally portrayed as complementary to Mare Nostrum, rather than replacing it.<sup>30</sup> Vessels operating under Triton were not to enter international waters and were limited to waters within 30 miles of the Italian coast.<sup>31</sup> Triton received significantly less funding than Mare Nostrum, running on a budget of € 2.9 million per month.<sup>32</sup> Frontex

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<sup>26</sup> Vice News, “Italy Is About to Shut Down the Sea Rescue Operation That Saved More Than 90,000 Migrants This Year”, 4 October 2014; [https://www.vice.com/en\\_us/article/d3j9gj/italy-is-about-to-shut-down-the-sea-rescue-operation-that-saved-more-than-90000-migrants-this-year](https://www.vice.com/en_us/article/d3j9gj/italy-is-about-to-shut-down-the-sea-rescue-operation-that-saved-more-than-90000-migrants-this-year).

<sup>27</sup> Deutsche Welle, “Italy phases out sea rescue mission for migrants”, 31 October 2014; <https://www.dw.com/en/italy-phases-out-sea-rescue-mission-for-migrants/a-18033647-0>; Australian Broadcast Company, “Recession to force Italy to abandon Mare Nostrum refugee rescue program”, 14 October 2014; <https://www.abc.net.au/radio/programs/am/recession-to-force-italy-to-abandon-mare-nostrum/5811262>.

<sup>28</sup> Yahoo News, 31 October 2014, op.cit.

<sup>29</sup> Vice News, 4 October 2014, op.cit.

<sup>30</sup> European Commission, 7 October 2014, op.cit.

<sup>31</sup> Vice News, 4 October 2014, op.cit.; The Guardian, 31 October 2014, op.cit.

<sup>32</sup> European Commission, 7 October 2014, op.cit.

has been specific in noting Italy's coordination role in Operation Triton, and Frontex vessels sent on search and rescue missions brought those migrants to Italian shores.<sup>33</sup>

52. International civil society raised strong concerns about the limited scope of Triton and fears that more migrants and refugees would die in their attempts to cross the Mediterranean.<sup>34</sup> Tineke Strik, rapporteur for the human rights body the Parliamentary Assembly of the Council of Europe (PACE), said: "We know that [under Triton] there will be gaps and a vacuum in the territorial waters off Libya, for instance, and that is where the main accidents occur."<sup>35</sup> Further, Italy's Minister of the Interior, Angelino Alfano, expressly noted that Triton would place the burden on North African countries to attend to search and rescue operations in their own waters.<sup>36</sup>

53. The result of the downshift from Operation Mare Nostrum, a search and rescue operation, to Operation Triton, a border protection operation, **saw almost no drop in the number of people attempting to cross the Mediterranean in 2015, as well as huge rise in the number of deaths in the Mediterranean in 2015, particularly around Libya.**<sup>37</sup>

54. Frontex has since continued to run operations in the Mediterranean, focussing on cross-border crime and security and including search and rescue. Operation Triton was expanded over time to include cross-border crimes, and ended on 1 February 2018, when it was superseded by Operation Themis, a projected four-year operation also supported by Frontex. Themis has an enhanced cross-border crime and security focus and does not extend into international waters.<sup>38</sup> Under Themis, Italy was not obliged to receive all migrants rescued, rather they were to be delivered to the nearest EU port.<sup>39</sup>

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<sup>33</sup> Frontex European Border and Coast Guard Agency, "Operation Triton" video, 13 April 2017; <https://frontex.europa.eu/media-centre/videos/operation-triton-uroUiS>.

<sup>34</sup> The Guardian, 31 October 2014, op.cit.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> The Guardian, "Migrants can't be left to die in the seas of Europe", 15 April 2015; <https://www.theguardian.com/commentisfree/2015/apr/15/migrants-cant-be-left-to-die-in-the-seas-of-europe>; The Guardian, "700 migrants feared dead in Mediterranean shipwreck", 19 April 2015; <https://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet>; The Guardian, "EU under pressure over migrant rescue operations in the Mediterranean", 15 April 2015; <https://www.theguardian.com/world/2015/apr/15/eu-states-migrant-rescue-operations-mediterranean>.

<sup>38</sup> Frontex European Border and Coast Guard Agency, "Operation Themis (Italy)"; <https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy/>.

<sup>39</sup> Deutsche Welle, "Frontex launches new EU border control mission Operation Themis", 1 February 2018; <https://www.dw.com/en/frontex-launches-new-eu-border-control-mission-operation-themis/a-42417610>.

55. Concurrently, Frontex also launched Operation Sophia on 22 June 2015. While the operation's core mandate is expressed as contributing to the EU's work to 'disrupt the business model of migrant smugglers and human traffickers in the Southern Central Mediterranean', it also has a direct focus on Libya. The Council of the EU states that Sophia:

*[T]rains the Libyan Coastguard and Navy and monitors the long-term efficiency of the training and it contributes to the implementation of the UN arms embargo on the high seas off the coast of Libya. In addition, the operation also conducts surveillance activities and gathers information on illegal trafficking of oil exports from Libya, in accordance with the UN Security Council resolutions. As such, the operation contributes to EU efforts for the return of stability and security in Libya and to maritime security in the Central Mediterranean region.<sup>40</sup>*

56. Up until March 2019, Operation Sophia rescued around 50,000 people before it was heavily compromised by member states' withdrawal of 'all naval assets'.<sup>41</sup> Sophia ended and was replaced by Operation EUNAVFOR MED IRINI ('Irinì') on 31 March 2020.

57. Irini, the name of the Greek goddess of peace, is not a humanitarian operation, rather a military operation which uses 'aerial, satellite and maritime assets' to implement the UN arms embargo on Libya.<sup>42</sup> Its secondary tasks include gathering information on illegal exports from Libya of products such as petroleum, and human smuggling and trafficking networks, and to **'contribute to the capacity building and training of the Libyan Coast Guard and Navy in law enforcement tasks at sea.'**<sup>43</sup>

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<sup>40</sup> European Council / Council of the European Union, "EUNAVFOR MED Operation Sophia: mandate extended until 30 September 2019"; <https://www.consilium.europa.eu/en/press/press-releases/2019/03/29/eunavfor-med-operation-sophia-mandate-extended-until-30-september-2019/>.

<sup>41</sup> EURACTIV, "A European 'Mare Nostrum' instead of Operation Sophia 2.0", 12 September 2019; <https://www.euractiv.com/section/justice-home-affairs/opinion/a-european-mare-nostrum-instead-of-operation-sophia-2-0/>.

<sup>42</sup> European Council / Council of the European Union, "EU Launches Operation IRINI to enforce Libya Arms Embargo", 31 March 2020; <https://www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/>.

<sup>43</sup> Ibid.

58. Irini is headquartered in Rome, Italy, and has an initial operation period of 12 months, continuing until 31 March 2021.<sup>44</sup> Rear Admiral Fabio Agostini is leading the operation as ‘EU Operation Commander’, while EU Member States will exercise ‘political control and strategic direction’.<sup>45</sup> Further, for Irini to continue, it must be reconfirmed every four months unanimously by the Political and Security Committee of the Council of the EU; otherwise it will be terminated.<sup>46</sup>
59. Irini does not expressly address search and rescue, and internal EU memos have revealed that the EU does not expect to be involved in rescue through this Operation.<sup>47</sup> Malta has frozen its financial support for Irini until the migrant crisis is addressed.<sup>48</sup>

### **C. EU Trust Fund for Africa**

60. Apart from the naval operations in the Mediterranean, the EU Trust Fund for Africa (EUTF) was launched in November 2015 with the objective of supporting a rights-based system of migrant management within Libya. The Constitutive Agreement to officially establish the EUTF was signed by the European Commission, 25 EU Member States, Norway and Switzerland.
61. The Trust Fund has so far mobilised € 408 million in projects in Libya.<sup>49</sup> Of this, around half has been allocated to protection and assistance to migrants, refugees and internally displaced people, a third to stabilisation of Libyan municipalities and a fifth to integrated

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<sup>44</sup> Ibid.

<sup>45</sup> European Union External Action, “EUNAVFOR MED Operation IRINI”, 2020; <https://www.operationirini.eu/about-us/>.

<sup>46</sup> EU Observer, “Operation Irini is Wrong, for Libya and for Sea Rescues”, 11 May 2020; <https://euobserver.com/opinion/148307>.

<sup>47</sup> The Guardian, “EU Agrees to Deploy Warships to Enforce Libya Arms Embargo”, 17 February 2020; <https://www.theguardian.com/world/2020/feb/17/eu-agrees-deploy-warships-enforce-libya-arms-embargo>.

<sup>48</sup> Times Malta, “Situation on Operation Irini Still ‘Unsolved’”, 15 May 2020; <https://timesofmalta.com/articles/view/situation-on-operation-irini-still-unsolved.792425>.

<sup>49</sup> EU Emergency Trust Fund for Africa, “EU Support on Migration in Libya Factsheet: EU Emergency Trust Fund for Africa – North of Africa window”, December 2019; [https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/eutf-factsheet\\_libya\\_dec\\_2019\\_1.pdf](https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/eutf-factsheet_libya_dec_2019_1.pdf).

border management.<sup>50</sup> All projects are implemented by international partners on the ground, such as UN agencies, EU Member States and non-governmental organisations.

62. The project partners are often given significant discretion over how spending is allocated and projects are implemented. For example, the IOM and UNHCR run a significant project to improve the conditions of detention centres which are run by the Libyan Directorate for Combatting Illegal Migration (DCIM).<sup>51</sup> However, these detention centres have been widely criticised for the arbitrary detention of migrants and consistent breaches of human rights.

63. **The EUTF does not condition the provision of funding on the closure of any migrant detention centres in Libya.** To the contrary, funds are allocated to help ensure the continued operation of detention centres including the supply of medical assistance and distribution of food and basic items within detention centres.

64. A significant aspect of the EUTF has been ‘voluntary humanitarian repatriation for migrants’ in which migrants that have arrived in Libya, attempting to reach Europe, are offered repatriation to their country of origin as an alternative to remaining in Libya or attempting to reach Europe via the Mediterranean. Since its operation, the repatriation programme has contributed to the return of over 50,000 migrants from within Libya.<sup>52</sup>

65. Evidence from Libyan officials, aid workers on the ground, and internal UN emails and meeting minutes shows that **a significant proportion of the EU’s funds is not reaching the intended beneficiaries, but instead ends up in the hands of the militia and people smugglers.**<sup>53</sup>

66. The evidence suggests that militias have siphoned millions of euros of these funds through contracts for UN-run migrant centres with food, catering and security companies

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<sup>50</sup> Ibid.

<sup>51</sup> Oxfam, “The EU Trust Fund for Africa: Trapped between aid policy and migration politics”, January 2020, pp.23-24; <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/620936/bp-eu-trust-fund-africa-migration-politics-300120-en.pdf>.

<sup>52</sup> Ibid.

<sup>53</sup> Associated Press, “Making Misery Pay: Libya Militias Take EU Funds for Migrants”, 31 December 2019; <https://pulitzercenter.org/reporting/making-misery-pay-libya-militias-take-eu-funds-migrants>.



controlled by militia leaders. This includes militia leaders such as Al-Khoja, who is also the deputy head of DCIM.<sup>54</sup> In addition, emergency goods delivered by UN agencies to detention centres reportedly end up being largely redistributed to workers at the migrant centres, and/or channelled to Libya's black market.<sup>55</sup>

67. Estimates from a number of parties on the ground state that of the 50 dinars a day allocated per detainee for food and other essentials, only 2 dinars is actually spent on meals.<sup>56</sup> In March 2019, Médecins Sans Frontières (MSF) reported that 'DCIM had not received any food supplies through the centrally managed service provider since October 2018.'<sup>57</sup>

68. **Reports also suggest that funding provided to detention centres is used for illicit activities such as extortion, enforced labour, selling migrants to Libyans, selling migrants between centres and to smugglers who coordinate the re-interception of migrants attempting to cross the Mediterranean, and armed groups using migrants in their own work.**<sup>58</sup> Evidence shows that both the EU and UN have been aware that much of the EU's funding is not reaching its intended beneficiaries, and was at risk of being so diverted.<sup>59</sup>

69. In addition to the EUTF, around € 98 million has been mobilised for Libya for the 2014 - 2020 period under the European Neighbourhood Instrument (ENI). This includes support to governance, public administration, private sector development, service delivery including in the health sector, support to civil society, youth and education. Under this bilateral support, a project is also focused on the support to rights-based migration management and the asylum system in Libya.<sup>60</sup>

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid; Arezo Malakooti, Global Initiative, "The Political Economy of Migrant Detention in Libya: Understanding the players and the business models", April 2019, pp.39, 41; <https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf>.

<sup>56</sup> Associated Press, 31 December 2019, op.cit.

<sup>57</sup> Malakooti, April 2019, op.cit, p.41.

<sup>58</sup> Ibid., pp.39, 43.

<sup>59</sup> Associated Press, 31 December 2019, op.cit.; European Commission, "European Union Trust Fund for Africa Risk Register", February 2019, R5, R19; [https://ec.europa.eu/trustfundforafrica/sites/eueta/files/risk\\_register\\_eutf\\_0.pdf](https://ec.europa.eu/trustfundforafrica/sites/eueta/files/risk_register_eutf_0.pdf).

<sup>60</sup> European Commission, "European Neighbourhood Policy And Enlargement Negotiations", no date; [https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/libya\\_en](https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/libya_en).

#### **D. Background to bilateral agreements between Italy and Libya**

70. Apart from the Italian and EU-led naval operations and EU funding, Italy has long promoted bilateral cooperation with the Libyan authorities concerning irregular migration across the Mediterranean. In the summer of 2000, a large number of irregular migrants reached the coasts of Sicily. As a result, in December 2000, the Italian and Libyan Governments signed in Rome the first general agreement aimed at fighting irregular migration.<sup>61</sup>
71. Several high-level meetings followed. In Tripoli in September 2002, the first High-Level Security Libyan-Italian Committee was held. The two Ministries of Interior achieved an operational agreement which led, in July 2003, to the establishment of permanent liaison in the fields of organized crime and illegal immigration between Italian police officers collaborating in Tripoli with colleagues of the Libyan Security General Directorate.<sup>62</sup>
72. Significant measures of co-operation were introduced in 2003 and 2004 under the Italian presidency of Silvio Berlusconi. Further bilateral agreements were signed between Italy and Libya, notably the July 2003 bilateral agreement,<sup>63</sup> which was signed by the chiefs of police and regulated the practical cooperation between the security forces.<sup>64</sup> A bilateral agreement was also signed in August 2004.
73. According to the Middle East Institute, between 2004 and 2006, a programme of charter flights was financed by Italy to fly irregular migrants back to their countries of origin.<sup>65</sup> This included the repatriation of 5688 migrants from Libya on 47 charter flights to Egypt,

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<sup>61</sup> Middle East Institute, "Italy and its Libyan Cooperation Program: Pioneer of the European Union's Refugee Policy?", 1 August 2010; <https://www.mei.edu/publications/italy-and-its-libyan-cooperation-program-pioneer-european-unions-refugee-policy>; European Commission, "Technical Mission to Libya on Illegal Migration 27 Nov - 6 Dec 2004 Report", 2005, p.58; <http://www.statewatch.org/news/2005/may/eu-report-libya-ill-imm.pdf>; the 2000 Agreement was not published; Mariagiulia Giuffr , "State Responsibility Beyond Borders: What Legal Basis for Italy's Push Backs to Libya?", 24 International Journal of Refugee Law, 692-734, 2012.

<sup>62</sup> European Commission, 2005, op.cit.

<sup>63</sup> The 2003 Agreement was not published; Giuffr , 2012, op.cit.

<sup>64</sup> Silja Klepp, "Negotiating the Principle of Non-Refoulement in the Mediterranean Sea: Missions, Visions and Policies at the Southern Borders of the European Union", Working Paper Series of the Graduate Centre Humanities and Social Sciences of the Research Academy Leipzig, No. 1, 2008; [https://home.uni-leipzig.de/~gsgas/fileadmin/Working\\_Papers/WP\\_1\\_Klepp.pdf](https://home.uni-leipzig.de/~gsgas/fileadmin/Working_Papers/WP_1_Klepp.pdf).

<sup>65</sup> Middle East Institute, 1 August 2010, op.cit.

Ghana and Nigeria, Mali, Pakistan, Niger, Eritrea, Bangladesh, Sudan and Syria.<sup>66</sup> Also, technical equipment and training was provided to assist with control at the Libyan borders, including patrol boats, lifeboats, cars and buses, binoculars, sacks for transport of corpses, road and naval GPS, signalling rockets, and kits for fingerprinting.<sup>67</sup>

74. In 2003, Italy financed the construction of a camp for irregular migrants in Gharyan, close to Tripoli.<sup>68</sup> In 2004, Italy allocated funds for the construction of two additional camps: one in Kufra, south-east Libya and close to the border with Egypt and Sudan, and the other in Sebha, south-west Libya.<sup>69</sup>

75. According to the European Commission report, the funding was classified as humanitarian support.<sup>70</sup> The Italian Government has only confirmed and disclosed the situation of the camps in a report by the Italian Audit Court. Out of 11,883 irregular migrants detained in Italian CPTAs in 2004, less than half were deported while the rest escaped or were released after the expiration of the maximum detention period.<sup>71</sup>

76. Since October 2004, reports document that more than 4,000 migrants were removed from the Italian island of Lampedusa to Libya.<sup>72</sup> In May 2006, there was a government reshuffle in Italy. However, border security and the financing of deportation flights and detention centres in Libya continued under the government headed by Romano Prodi.<sup>73</sup> Technical, political and operational meetings were held in Rome on 6 January and 28 April, and in Tripoli on 25 August and 26 September 2004.<sup>74</sup> Four technical meetings were held, in Rome and Tripoli, to better define support offered by Italy to Libya, including engagement

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<sup>66</sup> European Commission, 2005, op.cit., p.59.

<sup>67</sup> Ibid.

<sup>68</sup> Rutvica Andrijasevic, "Renounced Responsibilities: Detention, Expulsion and Asylum at the EU's Southern Border of Libya and Lampedusa", July 2006, p.14; <http://policy.hu/studydocs/andrijasevic.pdf>; Middle East Institute, 1 August 2010, op.cit.; European Commission, 2005, op.cit., p.59.

<sup>69</sup> Middle East Institute, 1 August 2010, op.cit., fn.11.

<sup>70</sup> Andrijasevic, July 2006, op.cit., p.14.

<sup>71</sup> Rutvica Andrijasevic, "How to Balance Rights and Responsibilities on Asylum at the EU's Southern Border of Italy and Libya", COMPAS University of Oxford, 2006; <https://oro.open.ac.uk/12652/1/COMPASWP.pdf>.

<sup>72</sup> Middle East Institute, 1 August 2010, op.cit. fn.16; Deutsche Welle, "Scharfe Kritik an Flüchtlingslagern auf Lampedusa" [Harsh Criticism of Detention Centers in Lampedusa], 23 September 2005; <https://www.dw.com/de/scharfe-kritik-am-flüchtlingslager-auf-lampedusa/a-1718149>.

<sup>73</sup> Middle East Institute, 1 August 2010, op.cit.

<sup>74</sup> European Commission, 2005, op.cit., p.59.

and provision of special training, and supplies of devices and equipment requested by the Libyan authorities and used to fight illegal immigration.<sup>75</sup>

77. Between 2007 and 2009, a number of bilateral agreements were signed between Italy and Libya, to reduce migration from Libya. These meetings combined negotiations concerning irregular migrations with trade and economic relations. On 16 October 2007 a contract concerning investment in the Libyan oil sector was signed between the two national energy companies ENI (Italy) and NOC (Libya). In November 2007, the Italian Minister of Foreign Affairs, Massimo D'Alema, visited Tripoli, and promised the construction of a highway and enhanced economic relations with Libya.
78. A further agreement was signed on 29 December 2007 aimed at reducing clandestine immigration, which reinforced bilateral maritime cooperation and allowed Italian boats to patrol in Libyan territorial waters for the first time. Joint maritime patrols of the Italian police and Libyan army were created.<sup>76</sup> Such joint patrols allowed the apprehension and return of migrants leaving Libya. This cooperative agreement resulted from informal negotiations between security experts and officials.
79. On 4 February 2009, Italy and Libya signed an Additional Protocol in Tripoli, which partially amended the 2007 agreement. Libya undertook to “coordinate its actions with those of the countries of origin in order to reduce clandestine immigration and ensure the repatriation of immigrants”. Italy undertook to provide three unmarked ships to Libya, for a period of three years, and to encourage the EU bodies to conclude an agreement between the EU and Libya.
80. On 30 August 2008, during the reign of Muammar Gaddafi, a *Treaty on Friendship, Partnership and Co-operation between Italy and the Great Socialist People's Libyan Arab Jamahiriya* (“Friendship Treaty”) was signed in Benghazi, which came into force in February 2009.<sup>77</sup> The bilateral agreement established a coordination unit for a **joint**

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<sup>75</sup> European Commission, 2005, op.cit, p.59.

<sup>76</sup> Natolino Ronzitti, “The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?”, Bulletin of Italian Politics, Vol. 1, No. 1, 2009, pp.125-133.

<sup>77</sup> “Treaty on Friendship, Partnership and Co-operation between Italy and the Great Socialist People's Libyan Arab Jamahiriya”, concluded in October 2008, and ratified by Italy through Law n. 7/09 of 6 February 2009.

**Italian-Libyan patrol,<sup>78</sup> allowing for the interception of migrants and refugees in international waters to be returned to Libya.** It also provided for Italy's direct collaboration with the Libyan Coast Guard.<sup>79</sup>

81. Article 19 of the Friendship Treaty stipulates the commitment to prevent clandestine immigration and Article 6 provides that the parties respect the principles of the United Nations Charter and the Universal Declaration of Human Rights.<sup>80</sup> The Friendship Treaty provided for a budget, of which 50% is paid by Italy and the rest by the European Union.<sup>81</sup> To judge from the law implementing the treaty, this budget formed a tax paid by Italian companies engaged in Libya, such as ENI. The Agreement stipulated that Italy would employ five billion dollars in aid.<sup>82</sup>

82. On 7 December 2010 former Interior Minister Roberto Maroni and Libyan Abdelfattah Farag Younis Al Obeidi signed a new technical and operational protocol to fight irregular migration by sea in order to further improve the cooperation.<sup>83</sup> In the case of *Hirsi Jamaa and Others v. Italy*, the European Court of Human Rights considered this policy, known as “pushbacks”, to breach the European Convention on Human Rights, specifically the right to *non-refoulement*.<sup>84</sup> According to a statement by the Italian Minister of Defence, the agreements between Italy and Libya were suspended following the events of 2011.<sup>85</sup>

83. On 17 June 2011, Italy signed a Memorandum of Understanding with the National Transitional Council of Libya. The MoU referred to earlier commitments in former

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<sup>78</sup> Report by the Special Rapporteur on the human rights of migrants, François Crépeau, “Mission to Italy (29 September - 8 October 2012)”, A/HRC/23/46/Add.3, 30 April 2013;

[https://www.ecoi.net/en/file/local/1260757/1930\\_1368617983\\_a-hrc-23-46-add3-en.pdf](https://www.ecoi.net/en/file/local/1260757/1930_1368617983_a-hrc-23-46-add3-en.pdf).

<sup>79</sup> Global Detention Project, “Country Report: Immigration Detention in Italy: Complicity in Grave Human Rights Abuses?”, October 2019; <https://www.globaldetentionproject.org/wp-content/uploads/2019/10/GDP-Immigration-Detention-in-Italy-E-Version.pdf>.

<sup>80</sup> ICJ, October 2014, op.cit.

<sup>81</sup> Internazionale, “Perché l'accordo tra l'Italia e la Libia sui migranti potrebbe essere illegale”, 20 February 2017; <https://www.internazionale.it/notizie/annalisa-camilli/2017/02/20/italia-libia-migranti-accordo-illegale>.

<sup>82</sup> Avvenire, “Memorandum. Accordo Italia-Libia sui migranti: il mistero dei 5 miliardi (per Tripoli)”, 31 October 2019; <https://www.avvenire.it/attualita/Pagine/i-soldi-a-tripoli-accordo-migranti>.

<sup>83</sup> European Migration Network, “Practical responses to irregular migration: the Italian case”, 2012;

[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/irregular-migration/it\\_20120105\\_practicalmeasuresstoirregularmigration\\_en\\_version\\_final\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/it_20120105_practicalmeasuresstoirregularmigration_en_version_final_en.pdf).

<sup>84</sup> *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012.

<sup>85</sup> ICJ, October 2014, op.cit.

agreements and provided for mutual assistance and co-operation in combating irregular immigration.<sup>86</sup> The then-rebel National Transitional Council “agreed to honour several accords signed between Italy and Gadhafi, including the deportation of irregular migrants without proper status. In effect, this Memorandum created a joint coordination committee whose function was to prepare for the reactivation of Italy-Libya Friendship.”<sup>87</sup>

84. In 2012, Italy agreed further with Libya to stop departures of migrants from Libya.<sup>88</sup> The Agreement stipulates that Italy will assist Libyan police forces with training and technical tools to control the border, proposes mechanisms for information sharing on irregular migrants and illegal smuggling networks and proposes construction of a detention centre in Kufra for irregular migrants.<sup>89</sup>

#### **E. Details of the Memorandum of Understanding of February 2017**

85. According to the UNHCR, in 2016 departures from Libya accounted for 89.7 percent of arrivals of migrants by sea in Italy.<sup>90</sup> On 2 February 2017, the Government of Italy (Prime Minister Paolo Gentiloni) signed a Memorandum of Understanding (MoU) with the Libyan Government of National Accord (“GNA”, Prime Minister Fayez al-Serraj).<sup>91</sup>

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<sup>86</sup> Migrants At Sea, “Memorandum of Understanding Between Italy and Libyan NTC”, 20 June 2017; <http://migrantsatsea.wordpress.com/2011/06/20/memorandum-of-understanding-between-italy-and-libyan-ntc/>; Middle East Institute, “Migration Agreements between Italy and North Africa: Domestic Imperatives versus International Norms”, 20 December 2012; <https://www.mei.edu/publications/migration-agreements-between-italy-and-north-africa-domestic-imperatives-versus>.

<sup>87</sup> Report by the Special Rapporteur on the human rights of migrants, François Crépeau, “Mission to Italy (29 September - 8 October 2012)”, 30 April 2013, op.cit.

<sup>88</sup> Amnesty International (Italy), “L’Accordo Italia - Libia in materia di immigrazione mette a rischio i diritti umani”, 12 June 2012; <https://www.amnesty.it/laccordo-italia-libia-in-materia-di-immigrazione-mette-a-rischio-i-diritti-umani/>; Pubblica Amministrazione e Stranieri Immigrati, “Ministero Dell’Interno Italiano - Ministero Dell’Interno Libico Accordo 3 Aprile 2012: Processo verbale della riunione tra il Ministro dell’Interno della Repubblica italiana e il Ministro dell’Interno della Libia (Tripoli, 3 aprile)”, 3 April 2014; <https://www2.immigrazione.regione.toscana.it/?q=norma&doc=/db/nir/DbPaesi/accordi/accordo-3-04-2012.xml&datafine=20190504&css=3>.

<sup>89</sup> Amministrazione e Stranieri Immigrati, 3 April 2014, op.cit.

<sup>90</sup> Global Detention Project, October 2019, op.cit., p.22; <https://www.globaldetentionproject.org/wp-content/uploads/2019/10/GDP-Immigration-Detention-in-Italy-E-Version.pdf>.

<sup>91</sup> Internazionale, “L’Italia rinnoverà l’accordo con la Libia con alcune modifiche. Annalisa Camilli, giornalista di Internazionale”, 30 October 2019; <https://www.internazionale.it/bloc-notes/annalisa-camilli/2019/10/30/italia-memorandum-libia>.

86. GNA is the UN-backed and internationally recognized government of Libya and the entity controlling the country.<sup>92</sup> The European Council backed the 2017 MoU in the Malta Declaration. The Declaration focused on cooperation with the Libyan authorities in order to limit migration across the “Central Mediterranean Route”.
87. The MoU was intended to extend and incorporate the previous commitments made in the 2008 Berlusconi-Gaddafi Friendship Treaty. According to the MoU, Italy would provide Libyan authorities with training and equipment, while also investing in Libyan border security and assisting with the combat against smuggling of people.<sup>93</sup>
88. The MoU consists of three pages and eight articles. Articles 1 and 2 set out commitments and cooperative efforts in accordance with the 2008 Friendship Treaty. Italy promises technical assistance to Libyan institutions that work on reducing irregular migration.
89. Article 2 refers to Italy’s financial support of “hosting centres” for migrants for which medical equipment will be supplied. Article 2 also refers to a land border control satellite detection system, referring to Article 19 of the 2008 Friendship Treaty.
90. Both Italy and Libya commit to training Libyan personnel in the hosting centres and agree to adopt a “wider and more complete Euro-African cooperation view, to eliminate the causes of irregular immigration”. Both parties agree to support organizations in Libya that return migrants to their country of origin, “including voluntary return”, and to start development programmes in Libya to create new jobs and prevent illegal revenue benefiting militias and local groups.
91. Article 3 sets out the parties’ aim to create a committee which can oversee the implementation of the agreement. While Article 4 refers to financing, Article 5 commits the parties to interpreting and applying the MoU in accordance with international and human rights obligations. The final three articles detail enforcement mechanisms and procedural matters.

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<sup>92</sup> Human Rights Watch, “Libya Events of 2018”, 2019; <https://www.hrw.org/world-report/2019/country-chapters/libya>.

<sup>93</sup> For a discussion of the MoU, see Anna Liguori, *Migratino Law and the Externalization of Border Controls, European State Responsibility*, Ch. 2: The Italy-Libya Memorandum of 2 February 2017, 2019 Routledge.

92. The MoU committed Italy to providing military, strategic and technological equipment and support, as well as funds for development, to a Libyan government under the influence of violent and armed militias, in order to block and control the departures of fleeing migrants. Although the European Council supported the parties' priorities of "providing training, equipment and support", the UN Committee against Torture (CAT) has expressed concerns regarding the compatibility of Italy's cooperation and support, with human rights.
93. In its Concluding Observations on the combined fifth and sixth periodic reports of Italy, the Committee expressed concern that the MoU "does not contain any particular provision that may render cooperation and support conditional on the respect of human rights, including the absolute prohibition of torture" and "the lack of assurances that cooperation for the purpose of enhancing the operational capabilities of the Libyan Coast Guard or other Libyan security actors would be reviewed in light of possible serious human rights violations".<sup>94</sup>
94. The CAT drew attention to "the numerous reports of dangerous, life-threatening interceptions by armed men believed to be from the Libyan Coast Guard" with reference to a report of the Secretary-General on the United Nations Support Mission in Libya,<sup>95</sup> and "the horrific conditions in detention facilities under the control of Libya's Department for Combating Illegal Migration" as documented by United Nations human rights monitors<sup>96</sup> and a press release from the Office of the United Nations High Commissioner for Human Rights.<sup>97</sup>
95. The language contained in the MoU is broad and imprecise. The precise amount of funding and specificities of support are not detailed, and the MoU does not distinguish asylum seekers from economic and other irregular migrants. Although the MoU specifies a time

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<sup>94</sup> UN Committee against Torture, "Concluding observations on the combined fifth and sixth periodic reports of Italy", CAT/C/ITA/CO/5-6, para. 22, December 2017.

<sup>95</sup> UN Security Council, "Report of the Secretary-General on the United Nations Support Mission in Libya", S/2017/726, para. 36, 22 August 2017.

<sup>96</sup> UN Security Council, "Report of the Secretary-General on the United Nations Support Mission in Libya", S/2017/726, para. 35, 22 August 2017.

<sup>97</sup> The Office of the United Nations High Commissioner for Human Rights News, "UN human rights chief: Suffering of migrants in Libya outrage to conscience of humanity", 4 November 2017; <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393>.



duration of three years up to February 2020, the terms agreed upon were designed to automatically renew in the event that no further agreement was reached.

**F. Details of the allegation that an infamous human trafficker (Abd al Rahman al-Milad) was present during the negotiations**

96. The discussions between Italy and Libya relating to the MoU were mired in allegations that an established human trafficker was given significant influence and control in representing the Libyan GNA during its negotiation and subsequent implementation.

97. Abd al Rahman al-Milad, also known as “Bija”, is head of the Zawya branch of the GNA Libyan Coast Guard<sup>98</sup> and regarded by the UN Security Council as a “a bloodthirsty human trafficker”. According to UN experts, Bija is suspected of sinking “migrant boats using firearms” and cooperating “with other migrant traffickers such as Mohammed Kachlaf<sup>99</sup> who, according to sources, provides him with protection to carry out illegal operations”.<sup>100</sup> Several photos circulated in Libya depict Bija celebrating victories in the field together with other militiamen.<sup>101</sup> Since July 2018 Bija has been subject to sanctions established by the United Nations Security Council,<sup>102</sup> in particular a travel ban and blocking of activities, for crimes being investigated by the International Criminal Court in The Hague.

98. Al Marsad, an established centre for human rights, provided evidence that Bija was one of the members of the Libyan delegation which met in Rome and in Sicily from 8 to 12 May 2017, following the signing of the 2017 MoU.<sup>103</sup> Al Marsad published a list of participants for the study visit of the Libyan delegation to Italy organised by the Italian Ministry of the

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<sup>98</sup> Internazionale, “L’Italia rinnoverà l’accordo con la Libia con alcune modifiche”, 30 October 2019; <https://www.internazionale.it/bloc-notes/annalisa-camilli/2019/10/30/italia-memorandum-libia>. Bija reportedly obtained this position with the support of his tribal cousins, Mohammed Kachlaf and Walid Kachlaf: Almarsad, “Exclusive: More Evidence that Trafficker Al-Bija Attended Training in Italy”, 7 November 2019; <https://almarsad.co/en/2019/11/07/exclusive-more-evidence-that-trafficker-al-bija-attended-training-in-italy/>.

<sup>99</sup> “Kachlaf, leader of the infamous Al-Nasr brigade, is subject to UN sanctions for trafficking in human beings and is believed to be the real owner of the Zawyah detention center, where UN observers have sporadic access”: see Avvenire.it, “Trattativa nascosta. Il viaggio del boss in Italia: Bija visitò altri centri migranti” 5 October 2019; <https://www.avvenire.it/attualita/pagine/il-giallo-del-negoziato-segreto-migranti-libia-trafficienti>.

<sup>100</sup> Avvenire.it, 5 October 2019, op. cit.

<sup>101</sup> Ibid.

<sup>102</sup> UN Security Council, Abd Al Rahman Al-Milad; <https://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/abd-al-rahman-al-milad>

<sup>103</sup> Almarsad, 7 November 2019, op. cit.; <https://almarsad.co/en/2019/11/07/exclusive-more-evidence-that-trafficker-al-bija-attended-training-in-italy/>.

Interior in cooperation with the EU, the International Organisation for Migration (IOM) and the Regional Development and Protection Programme (RDPP) for North Africa.

99. Nello Scavo, journalist for newspaper *Avvenire*, investigated and proved<sup>104</sup> that Bija attended discussions at Cara di Mineo, in Catania, one of the biggest migrant reception centres in Europe, on 11 May 2017.<sup>105</sup> Reportedly, among others present at a meeting at Cara di Mineo were torturers of migrants, as indicated by the victims of such abuse during investigations undertaken by Sicilian prosecutors.<sup>106</sup> The meetings concerned the “Italian reception model to be exported to Libya”, inaugurated in 2011 by the Berlusconi government with the then Northern League minister of the interior Roberto Maroni.<sup>107</sup> According to reports, the men of Bija’s militia “would have benefited from the EU Training Programme” (naval operations Eunavfor Med and Operation Sophia).<sup>108</sup>
100. Francesca Mannocchi, a journalist on *L’Espresso*, reported that Bija participated in several meetings and was also received by the Interior Ministry and the Ministry of Justice, headquarters of the Italian coast guard and the naval mission European Eunavfor Med.<sup>109</sup>
101. In an interview conducted by Mannocchi, Bija, the Libyan trafficker, stated that there would be a negotiation between the Italian government and the Libyans for stopping migrant departures. In 2017, several investigations reported on the existence of a secret negotiation parallel to the institutional one, which took place between Italian diplomats and Libyan traffickers, to stop departures of boats bound for Italy. In July 2017, departures from Libya suddenly decreased within one week.<sup>110</sup>
102. The UN stated that the meeting was organized by the Italian ministries involved in various capacities in the management of the migration crisis together with the Libyan

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<sup>104</sup> Internazionale, 30 October 2019, op. cit.

<sup>105</sup> The Guardian, “Human trafficker was at meeting in Italy to discuss Libya migration”, 4 October 2019; [https://www.theguardian.com/world/2019/oct/04/human-trafficker-at-meeting-italy-libya-migration-abd-al-rahman-milad?CMP=share\\_btn\\_link](https://www.theguardian.com/world/2019/oct/04/human-trafficker-at-meeting-italy-libya-migration-abd-al-rahman-milad?CMP=share_btn_link); Al Jazeera, “Italy’s dubious policies in Libya”, 7 November 2019; <https://www.aljazeera.com/indepth/opinion/italy-dubious-policies-libya-191101102013220.html>

<sup>106</sup> Avvenire.it, “Migranti. Chi è Bija, il guardacoste e trafficante libico pagato da Italia ed Europa”, 8 June 2019; <https://www.avvenire.it/attualita/pagine/migranti-trafficante-libico-pagato-da-europa>.

<sup>107</sup> Avvenire.it, 5 October 2019, op. cit.

<sup>108</sup> Ibid.

<sup>109</sup> Internazionale, 30 October 2019, op. cit.

<sup>110</sup> Ibid.

government, which had sent the list of participants.<sup>111</sup> The Italian Government said, “We dialogue with the legitimately recognized authorities, but also with the mayors, with the tribes, which constitute the connective fabric of the country. We need a political dialogue between East and West, a strong diplomatic push”.<sup>112</sup> United Nations sources confirm that the meeting took place in agreement with the Italian government and that Bija initially presented himself as Director of a centre for migrants. He was later referred to as a Coast Guard officer and also had the opportunity to visit the Pozzallo facility.<sup>113</sup>

103. Despite the confirmation that Bija exercised significant influence and control over MoU negotiations and subsequent implementation, and was present at meetings between Italy and Libya, no penal action has been taken by either Italy nor Libya to prevent or discourage his continued influence over the implementation of the MoU.

#### **G. Recreation of the Libyan Coast Guard**

104. Following the Libyan armed conflict in 2011, overall control over Libyan infrastructure and resources was fragmented between different militias and forces competing to form the new government. The Libyan Coast Guard’s capacity to monitor migrants leaving the country was severely reduced and divided into different sectors under control of competing command centres across the country, with units in the Eastern part of Libya reporting to the Parliament based in Tobruq and not to the GNA in Tripoli.<sup>114</sup>
105. The inability of the GNA to prevent the outflow of migrants from the country had been noted by experts who stated at the time that “Libya lacks the central government with sufficient control over the security apparatus, or the capacity and reach to govern its borders... Security – including ... coastguard and customs – is provided by an ever-changing spectrum of politically allied militia groups”.<sup>115</sup> The lack of capacity was also

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<sup>111</sup> Avvenire.it, 5 October 2019, op. cit.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Laessing, U., 2015, “Insight - Why Libya's coastguard struggles with migrant tide”, Reuters; <https://uk.reuters.com/article/uk-libya-security-coastguard-insight-idUKKCN0PU10020150720>.

<sup>115</sup> Reitano, T. and Micallef, M., 2017, “The anti-human smuggling business and Libya’s political end game”, Institute for Security Studies, p.11; <https://issafrica.s3.amazonaws.com/site/uploads/nar2.pdf>. See also Mangan, F. and Murtaugh, C., 2014, “Security and justice in post- revolution Libya: where to turn?”, United States Institute of Peace; [https://www.usip.org/sites/default/files/PW100-Security\\_and\\_Justice\\_in\\_Post-Revolution\\_Libya.pdf](https://www.usip.org/sites/default/files/PW100-Security_and_Justice_in_Post-Revolution_Libya.pdf).

commented upon by the UNSC Panel of Experts on Libya tasked with monitoring the sanctions which stated that “neither the coastguard nor the navy has been notified to the Committee as part of the security forces under the control of the Government of National Accord”.<sup>116</sup>

106. The recreation of the Libyan Coast Guard and the centralisation of its command to the GNA in Tripoli was funded and coordinated by the EU through the EU Trust Fund for Africa and by Italy through its bilateral relationship with the Libyan GLA, for the purpose of reducing the flow of migrants across the Mediterranean and the prevention of smuggling.

107. On 25 January 2017, a joint EU Commission and High Representative for Foreign Affairs document was published, commenting on the failure of the Libyan GLA to exercise control over the country. It stated:

*“... part of the answer must lie in the Libyan authorities preventing smugglers from operating, and for the Libyan Coast Guard to have the capacity to better manage maritime border and ensure safe disembarkation on the Libyan coast. Of course, the Libyan authorities’ effort must be supported by the EU and Member States notably through training, providing advice, capacity building and other means of support. ... Sophia and Triton could focus on anti-smuggling activities and support to search and rescue operations further out at sea and specialise in monitoring, alerting the Libyan authorities and combating traffickers. Recognising the central role that the Libyan Coast Guard should play in managing the situation, building its capacity is a priority, both in terms of capabilities and equipment needs.”<sup>117</sup>*

108. A week later, on 2 February 2017, Italy and the Libyan Government of National Accord (“GNA”) signed the MoU with the explicit aim of “stemming illegal migrants’ flows”. As

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<sup>116</sup> The Panel of Experts on Libya, 1 June 2017, “Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011)”, United Nations Security Council, para. 152; <https://reliefweb.int/sites/reliefweb.int/files/resources/N1711623.pdf>, accessed 11/04/2019.

<sup>117</sup> European Commission and High Representative of the Union for Foreign Affairs and Security Policy, “Joint Communication to the European Parliament, The European Council and the Council: Migration on the Central Mediterranean route: Managing flows, saving lives”, JOIN(2017), 25 January 2017, p.6; [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125\\_migration\\_on\\_the\\_central\\_mediterranean\\_route\\_-\\_managing\\_flows\\_saving\\_lives\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125_migration_on_the_central_mediterranean_route_-_managing_flows_saving_lives_en.pdf).

set out above, the GNA agreed to take measures for “stemming the migrant flows to Europe” and Italy agreed “to provide technical and technological support to the Libyan institutions in charge of the fight against illegal immigration, and that are represented by the border guard and the coast guard”.

109. The European Council encouraged efforts and initiatives from individual Member States directly engaged with Libya and welcomed Italy’s efforts to cooperate with Libya on migration through the implementation of the MoU.<sup>118</sup> In a Joint Statement on “[a]ddressing the Challenge of Migration”, it was agreed to pursue the return of irregular migrants to the countries of origin.<sup>119</sup> According to the Statement, “the Italian project to cooperate with 14 communities along migration routes in Libya is much welcomed, as are projects financed by the EU Emergency Trust Fund for Africa”.<sup>120</sup>

110. On 15 September 2017, the former minister of the Interior of Italy, Marco Minniti, stated that an Italy-Libya Committee met with representatives of UNHCR and IOM, and an “action plan” aimed at carrying out the 2017 MoU was produced.<sup>121</sup> Minniti confirmed that the activity of the Italian authorities is aimed at training, equipment and logistical support of the Libyan Coast Guard in close cooperation with the EU bodies. The objective was to collaborate with Libyan authorities, and strengthen their autonomous operative capacities rather than their *refoulement* activities.<sup>122</sup>

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<sup>118</sup> Amnesty International, Europe, “A perfect storm: The failure of European policies in the central Mediterranean”, 2017, p. 20.

<sup>119</sup> “Joint Statement: Addressing the Challenge of Migration and Asylum”, 28 August 2017, p. 1; [http://www.governo.it/sites/governo.it/files/documenti/documenti/Notizie-allegati/governo/Parigi\\_20170828/Joint\\_Statement-20170828.pdf](http://www.governo.it/sites/governo.it/files/documenti/documenti/Notizie-allegati/governo/Parigi_20170828/Joint_Statement-20170828.pdf).

<sup>120</sup> Ibid, p.4.

<sup>121</sup> Also included in the “action plan” was respect of human rights in Libyan centres, a programme linked with the UNHCR for the relocation in third countries of migrants, and assisted voluntary repatriation of those who cannot benefit from refugee status. The former Minister also stated that Italy was pursuing these initiatives in full harmony with the Commission and the countries of the EU. See: Marco Minniti, former Minister of Interior of Italy, “Letter to the Council of Europe Commissioner for Human Rights”, 11 October 2017; <https://rm.coe.int/reply-of-the-minister-of-interior-to-the-commissioner-s-letter-regardi/168075dd2d>.

<sup>122</sup> Marco Minniti, former Minister of Interior of Italy, “Letter to the Council of Europe Commissioner for Human Rights”, 11 October 2017; <https://rm.coe.int/reply-of-the-minister-of-interior-to-the-commissioner-s-letter-regardi/168075dd2d>.

111. However, Human Rights Watch confirmed that more than any other EU country, Italy is investing significant resources to enable Libyan authorities to intercept and detain those leaving the country by sea.<sup>123</sup> Reports claim Italy has “taken the lead in providing material and technical assistance to the Libyan Coast Guard and abdicated virtually all responsibility for coordination of rescue operations at sea in a bid to limit the number of people arriving on its shores”.<sup>124</sup>

### *Equipment*

112. Italy has been building the capacity of the Libyan authorities to stop irregular border crossings through provision and refurbishment of ships’ crews.<sup>125</sup> Additionally, on 20 March 2017 over € 800 million was requested by Libya: 10 ships, 10 patrol boats, 4 helicopters, 24 inflatable boats, 10 ambulances, 30 off-road vehicles, 15 equipped cars, at least 30 satellite phones and military equipment - not subject to the arms embargo voted by the UN.

113. In May 2017, Italy began to deliver the first of four patrol boats to the LCG.<sup>126</sup> Italy also promised to deliver a further six, and spent € 2.5 million in the refurbishment of another four speedboats to be used by the Libyan General Administration for Coastal Security.<sup>127</sup>

114. Also, Italy promised to provide two more large boats as well as 30 Zodiacs (rubber speedboats) by October 2018.<sup>128</sup> In October 2018, a 27-meter patrol boat was delivered by the Italian government to the LCG in order “to strengthen capacity in border control and fight against illegal trafficking”.<sup>129</sup> In 2018, the Italian government approved and donated 12 more speedboats to Libya to stem migration and maintained all 16 boats until the end

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<sup>123</sup> Human Rights Watch, “No Escape from Hell: EU Policies contribute to abuse of migrants in Libya”, 21 January 2019; <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>.

<sup>124</sup> Ibid.

<sup>125</sup> Amnesty International, “Italy: Refugees and Migrants’ Rights and Attack”, November 2019, p.10; <https://www.amnesty.org/en/documents/eur30/0237/2019/en/n/>.

<sup>126</sup> Human Rights Watch, “EU: Shifting Rescue to Libya Risks Lives”, 19 June 2017; <https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives>.

<sup>127</sup> Amnesty International, “Italy: Refugees and Migrants’ Rights and Attack”, November 2019, p.10; <https://www.amnesty.org/en/documents/eur30/0237/2019/en/n/>.

<sup>128</sup> Human Rights Watch, “EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk”, 25 July 2018; <http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf>.

<sup>129</sup> Ambasciata d'Italia in Libia, “Official account of the Italian Embassy in Libya”, 21 October 2018; <https://twitter.com/ItalyinLibya/status/1054015828977426433>.

the year.<sup>130</sup> Provisions for the sale of Italian naval units in support of the Coast Guard of the Ministry of Defense and of the Coastal Security Organs of the Libyan Ministry of Interior were converted into law on 10 July 2018 by Italy.<sup>131</sup>

### *Training*

115. The EU's anti-smuggling operation EUNAVFOR MED IRINI/Operation Sophia, which was under Italian command,<sup>132</sup> started training "Libyan Navy coast guard officers, petty officers, and seamen under the GNA's Defense Ministry in October 2016".<sup>133</sup>
116. According to reports, military personnel have participated in the EUNAVFOR MED Operation Sophia.<sup>134</sup> Allegedly, EU navy ships in the Mediterranean facilitated the training of 93 officers, while 42 officers were trained in Malta and Greece on land; the officers were due to continue in Italy and Spain up to the end of 2017.<sup>135</sup>
117. Another example of Italian training is a course held in Rome, Maritime Traffic Tracking (SMART), from 2 to 7 July 2017. Three officers of the Libyan Coast Guard started from 17 September 2017, and an additional course was held in Taranto, divided into a module

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<sup>130</sup> Amnesty International, "Italy: Refugees and Migrants' Rights and Attack", November 2019, p.10; <https://www.amnesty.org/en/documents/eur30/0237/2019/en/n/>. Also see: Italian Ministry of Interior, "Contro il traffico dei migranti: consegnate le prime motovedette alla Marina libica", 21 April 2017; [www.interno.gov.it/it/notizie/contro-traffico-dei-migranticongegnate-prime-motovedette-alla-marina-libica](http://www.interno.gov.it/it/notizie/contro-traffico-dei-migranticongegnate-prime-motovedette-alla-marina-libica). Also, "[o]n 29 June 2018, the spokesperson for the Libyan Navy claimed that no logistical, technical or financial support has been received from Europe and that the ships used by LCG were donated by Italy in 2010"; see The Office of the United Nations High Commissioner for Human Rights, "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya", 20 December 2018; <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>.

<sup>131</sup> Senato della Repubblica, "Senate Act n. 624 XVIII Legislature: DL n. 84/2018 - Transfer of naval units to Libya", 10 July 2018; [www.senato.it/leg/18/BGT/Schede/Ddliter/testi/50139\\_testi.htm](http://www.senato.it/leg/18/BGT/Schede/Ddliter/testi/50139_testi.htm).

<sup>132</sup> Amnesty International, "Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean", August 2018, p.19; <https://www.amnesty.org/download/Documents/EUR3089062018ENGLISH.pdf>.

<sup>133</sup> Human Rights Watch, "EU: Shifting Rescue to Libya Risks Lives", 19 June 2017; <https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives>. Also see Amnesty International, August 2018, op. cit.

<sup>134</sup> Council of the European Union, "COUNCIL DECISION on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)", 17 May 2015; <https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eunavfor-med-operation-sophia>.

<sup>135</sup> Human Rights Watch, 19 June 2017, op. cit.

for 85 students (Patrol Boat Crew Training) which was completed on 17 November 2017 and a module for seven students on 6 October 2017.<sup>136</sup>

118. On 7 July 2018, “Italy and Libya signed an agreement providing for the delivery of € 5 million to Libya to curb migration to Europe by stopping boats. The deal also includes military training.”<sup>137</sup> Further, Oxfam reported that since 2017 Italy has spent more than € 150 million to pay for the “training of staff employed in Libyan detention centers and to provide means for patrolling the so-called coast guard at sea and on land.”<sup>138</sup>

### *Operational and Logistical Support*

119. Since 2016, the EU has “worked on partnering and capacity-building with the Libyan coastguard”.<sup>139</sup> In 2017, the Italian government asserted that by 2020 over € 280 million would be invested only for maritime authorities.<sup>140</sup> Rome has reportedly given at least € 150 million to support the Libyan Coast Guard, to “improve” human rights conditions.<sup>141</sup> Italy has increased its capacity to better assist Libya in carrying out search and rescue operations and preventing irregular departures on the Central Mediterranean route<sup>142</sup>, reportedly to increase the command and control of the LCG.<sup>143</sup>
120. In 2017, Italy and the EU signed “cooperation agreements with the Tripoli-based Government of National Accord (GNA) to nominally improve conditions in detention facilities as well as boosting the capacity of the coastguard and the DCIM.”<sup>144</sup> The policy

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<sup>136</sup> Senato Della Repubblica, “Relazione Analitica Sulle Missioni Internazionali In Corso e Sullo Stato Degli Interventi Di Cooperazione Allo Sviluppo o Sostegno Dei Processi Di Pace e Di Stabilizzazione, Deliberata Dal Consiglio Dei Ministri II”, 28 December 2017, p.38.

<sup>137</sup> European Parliament, “EU funding of the Libyan coastguard”, 11 September 2018; [https://www.europarl.europa.eu/doceo/document/E-8-2018-004604\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-8-2018-004604_EN.html).

<sup>138</sup> Internazionale, “Money allocated from the memorandum is sourced from several funds”, 30 October 2019; <https://www.internazionale.it/bloc-notes/annalisa-camilli/2019/10/30/italia-memorandum-libia>.

<sup>139</sup> Global Detention Project, August 2018, op.cit.,

<sup>140</sup> Avvenire.it, “Memorandum. Accordo Italia-Libia sui migranti: il mistero dei 5 miliardi (per Tripoli)”, 31 October 2019; <https://www.avvenire.it/attualita/Pagine/i-soldi-a-tripoli-accordo-migranti>.

<sup>141</sup> Avvenire.it, “Memorandum. Accordo Italia-Libia sui migranti: il mistero dei 5 miliardi (per Tripoli)”, 31 October 2019; <https://www.avvenire.it/attualita/Pagine/i-soldi-a-tripoli-accordo-migranti>.

<sup>142</sup> European Commission, “Central Mediterranean Route: Commission Proposes Action Plan to Support Italy, Reduce Pressure and Increase Solidarity”, 4 July 2017; <https://bit.ly/2tnTE1T>.

<sup>143</sup> US Department of State, “Annual report on terrorism (covering 2018), Libya”, 1 November 2019; <https://www.state.gov/reports/country-reports-on-terrorism-2018/#Libya>.

<sup>144</sup> Global Detention Project, “Country Report Immigration Detention in Libya: ‘A Human Rights Crisis’”, August 2018; <https://www.globaldetentionproject.org/wp-content/uploads/2018/08/GDP-Immigration-Detention-Libya.pdf>.



of transferring responsibility to the LCG has intensified and the coordination of rescue operations has been increasingly transferred to the Libyan authorities.<sup>145</sup>

121. Prior to the declaration of the Libyan Search and Rescue zone, Italy set up an interagency National Coordination Centre (NCC) and Maritime Rescue Coordination Centre (MRCC), together forming the Joint Rescue Coordination Center (scJRCC) in a joint building in Tripoli.<sup>146</sup> This scJRCC was funded through the EUTF and was based in a joint building in Tripoli, in order to facilitate the coordination between the different Libyan services involved in border surveillance and control.<sup>147</sup>

122. Since May 2017,<sup>148</sup> the MRCC has transferred responsibility to Libyan coast guard forces in international waters “even when there are other, better-equipped vessels, including its own patrol boats or Italian navy vessels, closer to the scene”. Commercial ships are instructed by Italy to give migrants and asylum seekers to LCG forces at sea or disembark people directly in Libya.<sup>149</sup>

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<sup>145</sup> Amnesty International, “Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean”, August 2018;

<https://www.amnesty.org/download/Documents/EUR3089062018ENGLISH.pdf>.

<sup>146</sup> Alarm Phone, Borderline Europe, Mediterranean – Saving Humans, Sea-Watch, “Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean”, 17 June 2020, p.7;

[https://www.eu-libya.info/img/RemoteControl\\_Report\\_0620.pdf](https://www.eu-libya.info/img/RemoteControl_Report_0620.pdf).

<sup>147</sup> Ibid. See the reconstruction made by the *Tribunale di Roma – Collegio per i reati ministeriali* in the proceeding against M. Salvini and M. Piantedosi n. 6/2019, decision of 21 November 2019, and N. Scavo, 18 april 2019; <https://www.avvenire.it/attualita/pagine/esclusivo-la-verita-sui-respingimenti-in-mare>.

<sup>148</sup> Human Rights Watch, “EU: Shifting Rescue to Libya Risks Lives”, 19 June 2017;

<https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives>.

<sup>149</sup> Human Rights Watch has documented the Sedef in June 2018, the Vos Thalassa in July 2018, and the Nivin in November 2018. In the case of the Sedef and Vos Thalassa, Human Rights Watch spoke with company representatives. In the case of the Nivin, Human Rights Watch saw email communication between the IMRCC and the Nivin; see Human Rights Watch, “No Escape from Hell: EU Policies contribute to abuse of migrants in Libya”, January 2019; <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>. Also, on 30 July 2018, the commercial supply vessel Asso Ventotto, operating under Italian flag to assist operations at an oil rig 57 nautical miles off Tripoli, disembarked 101 people in Libya. As reported by Amnesty International, the private company operating the ship instructed the vessel’s captain to coordinate with the Tripoli Joint Rescue Co-ordination Centre. A Libyan official present on the oil rig boarded the Asso Ventotto and guided the operation. A Libyan Coast Guard vessel then approached the Asso Ventotto and accompanied it to the port of Tripoli. The Libyan Coast Guard stated that the Italian-owned Asso Ventotto is rented by Libyan authorities and this practice of using merchant vessels to return people to Libya is not new to Libyan authorities (phone conversation with representative of Libyan Coast Guard and Amnesty International, 1 August 2018). See Amnesty International, “Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean”, August 2018; <https://www.amnesty.org/download/Documents/EUR3089062018ENGLISH.pdf>.

123. In 2018, it was reported that a Libyan operations room had been set up aboard an Italian navy ship docked in Tripoli.<sup>150</sup> Human Rights Watch published details of a meeting with Colonel Abu Ajeila Ammar, head of Libyan Coast Guard search and rescue operations, who said, “[w]e coordinate with MRCCs Rome and Malta, and the operations room is there to enhance the cooperation”.<sup>151</sup>
124. Italy has assisted the LCG in setting up the Libyan Search and Rescue (SAR) region and two coordination centres in Libya.<sup>152</sup> In June 2018, the IMO officially acknowledged Libya’s declaration of a SAR zone.<sup>153</sup> Since June 2018, Italy has instructed ships undertaking rescues in the SAR zone to refer all emergency calls to the Libyan authorities. Italian ports prevent NGO ships from disembarking, to prevent interference with LCG interception and return of rescues to Libya.
125. Italy has stationed at least one Italian navy ship in Libyan territorial waters.<sup>154</sup> The Italian Navy continues<sup>155</sup> to support Libyan authorities in Libya in the coordination of sea operations within the newly established Libyan SAR region.<sup>156</sup> In July 2017 the LCG intercepted 8,851 migrants at sea; in July 2018, 12,490 migrants at sea were intercepted. This amounts to a 41% increase in LCG interceptions. In July 2018, 71% of migrants

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<sup>150</sup> Human Rights Watch, “EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk”, 25 July 2018;

<https://www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk>.

<sup>151</sup> Human Rights Watch, “EU: Shifting Rescue to Libya Risks Lives”, 19 June 2017;

<https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives>. Also Human Rights Watch reported that “[o]n May 10, the Italian Maritime Rescue Coordination Center (MRCC) in Rome received the first distress call about a boat in trouble and ordered the German group Sea-Watch to provide assistance but then allowed Libyan coast guard forces to assume coordination and a Libyan patrol boat to take over the operation. Although MRCC Rome learned of the boat when it was still in Libyan territorial waters, the incident occurred roughly 20 nautical miles from the Libyan coast, in international waters, and Sea-Watch had already begun its rescue operation”. See Human Rights Watch, “EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk”, 25 July 2018; <https://www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk>.

<sup>152</sup> Amnesty International, “Italy: Refugees and Migrants’ Rights and Attack”, November 2019’, p.11;

<https://www.amnesty.org/en/documents/eur30/0237/2019/en/n/>.

<sup>153</sup> Human Rights Watch, “EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk”, 25 July 2018;

<https://www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk>.

<sup>154</sup> Commissioner for Human Rights, “Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean”, June 2019, p. 20; <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87>. Also see “Deliberazione del Consiglio dei Ministri in merito alla partecipazione dell’Italia alla missione internazionale in supporto alla Guardia costiera libica adottata il 28 luglio 2017. Atto del Governo DOC. CCL, n. 2”, July 2017, p.5;

<http://documenti.camera.it/Leg17/Dossier/Pdf/DI0613.pdf>.

<sup>155</sup> Amnesty International, “Italy: Refugees and Migrants’ Rights and Attack”, November 2019’, p.11;

<https://www.amnesty.org/en/documents/eur30/0237/2019/en/n/>.

<sup>156</sup> Amnesty International, “Italy: Refugees and Migrants’ Rights and Attack”, November 2019’, p.11;

<https://www.amnesty.org/en/documents/eur30/0237/2019/en/n/>.

leaving Libya's shores were intercepted and brought back, compared to 6% during the same period in the previous year.<sup>157</sup>

126. Reports also confirm a joint maritime surveillance operation between Italy and Libya.<sup>158</sup> According to sources, € 63,442,734 was allocated for the period 1 January 2018 - 30 September 2018 for the purpose of enhancing the national air and naval assets prepared for the surveillance and security of national borders in the Central Mediterranean area, called Safe Sea, inclusive of the mission in support of the LCG requested by the Presidential Council of the Libyan national accord government.<sup>159</sup>

127. As of February 2020, Human Rights Watch documented that the material and technical support from Italy has enabled the LCG to intercept over 40,000 migrants at sea and facilitated their forced return to Libya.<sup>160</sup>

128. Italy has also supported "the refurbishment of Libyan detention centres and funded the distribution of aid in these facilities by international and Libyan NGOs".<sup>161</sup>

### *Anti-trafficking*

129. Italy has reportedly paid Libyan militias to provide additional control over migration fluxes, negotiating with them through mayors and local leaders to secure their support.<sup>162</sup> This included a pledge to create new economic opportunities in their territories "if they

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<sup>157</sup> Guest post by Matteo Villa (Italian Institute for International Political Studies, Milan), Rob Gruijters (Department of Social Sciences, Humboldt University, Berlin) and Elias Steinhilper (Department of Political and Social Sciences, Scuola Normale Superiore, Florence), University of Oxford, Faculty of Law, "Outsourcing European Border Control: Recent Trends in Departures, Deaths and Search and Rescue Activities in the Central Mediterranean", 11 September 2018; <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/09/outsourcing>.

<sup>158</sup> Institute for Security Services, "Human smuggling and Libya's political end game", December 2017, p.2; <https://globalinitiative.net/wp-content/uploads/2018/01/2017-12-13-pamphlet-migration.pdf>.

<sup>159</sup> Consiglio dei Ministri, "Relazione analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione", 28 December 2017, DOC. CCL-bis, N. 1, Scheda 36, p. 101; [www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf](http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf).

<sup>160</sup> Human Rights Watch, "Italy: Halt Abusive Migration Cooperation with Libya", 12 February 2020; <https://www.hrw.org/news/2020/02/12/italy-halt-abusive-migration-cooperation-libya>.

<sup>161</sup> Global Detention Project, August 2018, op.cit.

<sup>162</sup> The Washington Post, "Italy claims it's found a solution to Europe's migrant problem. Here's why Italy's wrong", 26 September 2017; <https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/25/italy-claims-its-found-a-solution-to-europes-migrant-problem-heres-why-italys-wrong/>.

help us in the fight against smuggling of human beings and in the management of migration from central Africa”.<sup>163</sup>

130. Rival militias have been paid by Italy in order to stop migrant boats not fully under government control.<sup>164</sup> In 2017, Italy negotiated a deal with representatives of the GNA, the Anas Debashi and Brigade 48 militias, which controlled Sabratha and the smuggling business in the town at the time, as well as militias from neighbouring towns.<sup>165</sup> At a meeting in Sabratha, the militias committed to preventing migrants from attempting to leave and exit the country, while the Italian authorities committed to provide them with equipment, boats and salaries channeled through the GNA.<sup>166</sup>

131. Deals between Italy and Libyan authorities have allegedly “enabled armed groups, criminal gangs, smugglers, and traffickers to control much of the flow of migrants”.<sup>167</sup> Ahmed AlDabbashi (as known as Al-Amu), from the town of Sabratha, and Abd al Rahman al-Milad (also known as “Bija”), from the Refinery Coastguard unit in the town of Zawiya, head the maritime crew with the greatest number of interceptions of all coastguard units in western Libya.

132. According to the IOM, traffickers intercepted more than half of the 10,989 migrants at sea between January and June 2017.<sup>168</sup> These militias started cooperating in June, allegedly brought together by a deal with the Italian security services.<sup>169</sup> Global Initiative reports

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<sup>163</sup> Amnesty International, “Italy: Submission to the United Nations committee against torture”, 2017, p.52; [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ITA/INT\\_CAT\\_CSS\\_ITA\\_29165\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ITA/INT_CAT_CSS_ITA_29165_E.pdf); Ministero dell’Interno, “Minniti e i sindaci delle comunità libiche: i trafficanti sono un nemico comune”, 2017, p.50; <http://www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficanti-sono-nemico-comune/>; Repubblica, 2017, “Minniti: ‘Sui migranti ho temuto per la tenuta democratica Paese’”; [http://www.repubblica.it/politica/2017/08/29/news/minniti\\_sui\\_migranti\\_ho\\_temuto\\_per\\_la\\_tenuta\\_democratica\\_paese\\_-174164861/](http://www.repubblica.it/politica/2017/08/29/news/minniti_sui_migranti_ho_temuto_per_la_tenuta_democratica_paese_-174164861/).

<sup>164</sup> Global Detention Project, October 2019, op.cit., p.9.

<sup>165</sup> Ministero dell’Interno, “Minniti e i sindaci delle comunità libiche: i trafficanti sono un nemico comune”, 2017; [www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficanti-sono-nemico-comune](http://www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficanti-sono-nemico-comune/); see also Associated Press, “Backed by Italy, Libya enlists militias to stop migrants”, 29 August 2017; <https://apnews.com/9e808574a4d04eb38fa8c688d110a23d>.

<sup>166</sup> Ibid.

<sup>167</sup> Associated Press, “Italian Effort to Stop Migrants Fuels Bloody Battle in Libya”, 5 October 2017; <https://www.voanews.com/a/libya-militias-migrants-sabratha/4057716.html>.

<sup>168</sup> Institute for Security Studies, “Human smuggling and Libya’s political end game”, December 2017, p.3; <https://globalinitiative.net/wp-content/uploads/2018/01/2017-12-13-pamphlet-migration.pdf>.

<sup>169</sup> Ibid.

that “[l]ocals spoke of extraordinary sums of money being transferred to both men, and assurances they would not face international prosecution.”<sup>170</sup>

#### **H. Italian criminalisation and disruption of independent search and rescue operations, refusal to permit migrants to disembark**

133. Between 2014 and 2016, Italy reduced efforts to provide SAR operations over the Mediterranean.<sup>171</sup> Apart from ceasing government controlled operations, in 2017 Italy introduced a code of conduct governing rescues following a campaign to delegitimise and criminalize NGOs that conducted independent SAR missions in the Mediterranean.<sup>172</sup> This effort to delegitimise such missions was backed by EU institutions.<sup>173</sup>

134. Since June 2018, Italy has refused or delayed vessels carrying rescued migrants from disembarking in its ports.<sup>174</sup> According to Amnesty International this has exposed “traumatized and exhausted individuals, including children, to the risks of prolonged periods at sea and in some cases arbitrarily detaining them on board ships”.<sup>175</sup>

135. In 2018, Italy’s Interior Minister (1 June 2018 to 5 September 2019), Matteo Salvini, argued that all migrants rescued by European vessels should be sent back to Libya.<sup>176</sup> In May 2019, Salvini drafted a new law, dubbed “the Decreto Sicurezza Bis”, which set out fines for NGO vessels of up to € 5,500 per rescued person.<sup>177</sup> The tabled decree included provisions which give the Interior Minister the power to restrict and prohibit transit within Italian territorial waters. Italian president Sergio Mattarella signed the bill and it is now law.<sup>178</sup>

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<sup>170</sup> Ibid.

<sup>171</sup> Amnesty International, March 2019, op.cit.

<sup>172</sup> Human Rights Watch, “European Union: Events of 2017”, 18 January 2018; <https://www.hrw.org/world-report/2018/country-chapters/european-union>.

<sup>173</sup> Ibid.

<sup>174</sup> Amnesty International, March 2019, op.cit.

<sup>175</sup> Ibid.

<sup>176</sup> InfoMigrants, “Salvini Calls for Migrants to go Back to Libya,” 17 July 2018; <http://www.infomigrants.net/en/post/10685/salvini-calls-for-migrants-to-go-back-to-libya>.

<sup>177</sup> Global Detention Project, October 2019, op.cit.

<sup>178</sup> L. Tondo, “Italy Adopts Decree That Could Fine Migrant Rescuers up to € 50,000”, The Guardian, 15 June 2019; <https://www.theguardian.com/world/2019/jun/15/italy-adopts-decree-that-could-fine-migrant-rescue-ngo-aid-up-to-50000>.

136. The UNHCR reports that “[u]nder changes approved by Parliament, fines for private vessels that undertake the rescue of people and do not respect the ban on entry into territorial waters have risen to a maximum of € 1 million”, and “[i]n addition, vessels will now be automatically impounded”.<sup>179</sup> The UNHCR condemned the bill, arguing “it would penalise rescues at sea” and urged Rome “to revise the decree and ... to amend it, putting the protection of refugees and the saving of human lives at the centre”.<sup>180</sup>

137. Similarly, the Special Rapporteur for the human rights of migrants and the Special Rapporteur on torture urged the country not to adopt the decree, stating:

*We urge authorities to stop endangering the lives of migrants, including asylum seekers and victims of trafficking in persons, by invoking the fight against traffickers. This approach is misleading and is not in line with both general international law and international human rights law. Instead, restrictive migration policies contribute to exacerbating migrants’ vulnerabilities and only serve to increase trafficking in persons.*<sup>181</sup>

138. In early June 2018, the closed port policy started affecting rescue operations. The Aquarius, a ship operated by Doctors Without Borders and *SOS Méditerranée*, rescued 629 people crossing the Mediterranean. This included 123 unaccompanied minors, 11 other children and several pregnant women. The vessel was brought to Italian waters and sought permission to disembark and for the migrants on board to be processed for their eligibility to claim asylum in Italy. The vessel was refused permission to disembark at an Italian port by orders made by both Matteo Salvini, then Minister of the Interior, and the Italian Prime Minister, Giuseppe Conte.<sup>182</sup>

139. Upon being refused permission to disembark, the migrants were left stranded at sea on board the Aquarius with no port to receive them. On 12 June 2018, while the migrants remained stranded, MSF released an urgent request to Italy to allow the migrants to

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<sup>179</sup> UN News, “‘€ 1 million’ fines for rescue boats prompts UN concern for future sea operations”, 6 August 2019; <https://news.un.org/en/story/2019/08/1043751>.

<sup>180</sup> L. Tondo, *The Guardian*, 15 June 2019, op.cit.

<sup>181</sup> UN Human Rights Council, “Italy: UN Experts Condemn Bill to Fine Migrant Rescuers”, 20 May 2019; <https://reliefweb.int/report/italy/italy-un-experts-condemn-bill-fine-migrant-rescuers>.

<sup>182</sup> Financial Times, “Italy refuses port access to migrant rescue boat”, 11 June 2018; <https://www.ft.com/content/7c6b73a4-6cfe-11e8-92d3-6c13e5c92914>.

disembark which included the following details concerning the medical condition of migrants on board the vessel:

*MSF is particularly concerned about several critical drowning and hypothermia patients who had to be resuscitated. These patients are being closely monitored on board as they could quickly develop significant pulmonary issues after swallowing sea water. Many rescued people have reported aspiration and are therefore at risk of developing pulmonary disease or pneumonia over the coming days. There are also 21 patients on board who have suffered severe chemical burns after being exposed to a toxic mixture of sea water and fuel for an extended period of time. These patients are stable but will need ongoing wound care and dressing changes over the coming days and weeks. Finally, there are several serious orthopaedic cases with associated infections that need immediate surgical evaluations and operations, which MSF is unable to provide on the ship.*<sup>183</sup>

140. Despite the confirmation of the unaccompanied minor children, pregnant women and individuals in need of immediate medical attention, the Italian government continued to refuse to allow the vessel to disembark in Italy. After 8 days, the Prime Minister of Spain granted permission for the vessel to disembark at Valencia, where the migrants received medical attention and were permitted to claim refugee protection.

141. The head of MSF Spain stated, “[this] is a very negative precedent. The truth is there is a question on the table as to whether this is a single event which is resolved quickly, or if we will no longer be allowed to dock in Italy and the blockage continues which would completely change rescue operations.”<sup>184</sup> On the other hand, Matteo Salvini declared this outcome as a ‘victory’ for Italy.<sup>185</sup>

142. Other vessels that were refused permission to disembark at Italian ports include Lifeline and NGO vessels such as Sea Watch, Sea Fuchs, Sea Eye, Mediterranean and Open Arms.

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<sup>183</sup> Médecins Sans Frontières/Doctors Without Borders Statement, “MSF urges immediate disembarkation of 629 people on board Aquarius at nearest port of safety”, 12 June 2018; <https://www.msf.org/msf-urges-immediate-disembarkation-629-people-board-aquarius-nearest-port-safety>.

<sup>184</sup> TheLocal.IT, “Rejected migrant ship is ‘symbol of EU’s failure’”, 15 June 2018; <https://www.thelocal.it/20180615/rejected-migrant-ship-is-symbol-of-eus-failure>.

<sup>185</sup> The Guardian, “Italian minister declares victory as Spain accepts rescue boat”, 11 June 2018; <https://www.theguardian.com/world/2018/jun/11/un-calls-for-migrant-ship-to-be-allowed-to-dock-in-italian-port>.

An Italian Coast Guard vessel was also prevented from docking at an Italian port.<sup>186</sup> Doctors Without Borders document that 2,443 people remained at sea while waiting for authorisation to disembark in Italy.<sup>187</sup>

143. In June 2019, the German charity rescue and Dutch-flagged vessel Sea Watch 3 was sailing in the Strait of Sicily. Following a rescue operation, the vessel had to remain at sea for 16 days awaiting authorisation to dock in a place of safety.<sup>188</sup> Amongst those rescued on board were toddlers and pregnant women.<sup>189</sup> During this period Italian Minister of the Interior and Deputy Prime Minister Matteo Salvini declared every day that no NGO would set foot in Italy to land migrants any more, blaming Europe for its inaction.

144. On 15 June Italian authorities allowed 10 migrants to disembark due to medical concerns.<sup>190</sup> Captain Carola Rackete was arrested after manoeuvring the ship carrying some 41 migrants<sup>191</sup> into the port of Lampedusa without permission, a crime punishable by between three and 10 years in jail.<sup>192</sup> Rackete was later released but still faces possible charges for helping illegal immigration.<sup>193</sup>

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<sup>186</sup> Friedrich Ebert Stiftung, “Immigration in Italy Between Two Elections: Myths and Reality”, July 2019; <http://library.fes.de/pdf-files/bueros/rom/15603.pdf>.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Infomigrants, “Orphaned in Liberia, Mariam reaches Italy on the Sea-Watch 3”, 26 July 2019; <https://www.infomigrants.net/en/post/18423/orphaned-in-liberia-mariam-reaches-italy-on-the-sea-watch-3>.

<sup>190</sup> Ibid.

<sup>191</sup> Euronews, “Sea-Watch captain Carola Rackete released by Italian judge”, 26 July 2019; <https://www.euronews.com/2019/07/02/sea-watch-captain-carola-rackete-released-by-italian-judge>.

<sup>192</sup> Al Jazeera, “Sea-Watch enters Lampedusa, captain Carola Rackete arrested”, 29 June 2019; <https://www.aljazeera.com/news/2019/06/sea-watch-enters-lampedusa-captain-carola-rackete-arrested-190629050255767.html>.

<sup>193</sup> Euronews, 26 July 2019, op. cit.



## **I. Intercepted migrants are subjected to systematic torture in formal and informal detention centres in Libya**

145. The conditions experienced by refugees and migrants in Libya have been extensively documented by the OHCHR and UNSMIL,<sup>194</sup> and have been denounced by a wide range of United Nations Special Rapporteurs (SR) and working groups on human rights, including the SR on torture and other cruel, inhuman or degrading treatment or punishment, the SR on the situation of human rights defenders, the SR on the human rights of migrants, the SR on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and the SR on trafficking in persons.<sup>195</sup>
146. Mr. Nils Melzer, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, described the detention regime for migrants and refugees in Libya as grossly incompatible with international standards for

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<sup>194</sup> United Nations Support Mission in Libya & United Nations Human Rights Office of the High Commissioner, “Detained and Dehumanized : Report on Human Rights Abuses Against Migrants in Libya”, 13 December 2016; [https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised\\_en.pdf](https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf); and United Nations Support Mission in Libya & United Nations Human Rights Office of the High Commissioner, “Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya”, 20 December 2018; <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>.

<sup>195</sup> Correspondence to Government of Italy concerning negotiations between the Italian government and the Libyan GNA on the Memorandum of Understanding and the human rights impact on migrants from the Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2 February 2017; <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22975>; Correspondence to Government of Italy concerning the completion and implementation of the Memorandum of Understanding and the human rights impact on migrants from the Working Group of Experts on People of African Descent; Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; Special Rapporteur on minority issues; Independent Expert on human rights and international solidarity; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Special Rapporteur on trafficking in persons, especially women and children; and Special Rapporteur on violence against women, its causes and consequences, 12 November 2017; <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24084>; Correspondence to Government of Italy concerning the Italian Directive for the unified coordination of surveillance activities of maritime borders and fight against illegal immigration and its human rights impact on migrants and search and rescue operations in the Mediterranean from the Special Rapporteur on the situation of human rights defenders; Independent Expert on human rights and international solidarity; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on trafficking in persons, especially women and children, 15 May 2019; <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24568>.

the treatment of prisoners, as inflicting undue pain and suffering on migrants and as inconsistent with the prohibition of torture and other ill treatment.<sup>196</sup>

147. Several international NGOs concerned with human rights have documented these findings, including Human Rights Watch, Amnesty International and Doctors Without Borders.<sup>197</sup>

148. During their time in Libya, migrants and refugees are at extremely high risk of torture, unlawful killings, enforced disappearances, arbitrary and indefinite detention, sexual and gender-based violence, forced labour and exploitation by both State and non-State actors.

149. The evidence of gross abuses of migrants and refugees is so overwhelming that, on 9 May 2017, the ICC Prosecutor made this statement before the United Nations Security Council:

*[S]erious and widespread crimes allegedly committed against migrants attempting to transit through Libya ... I am deeply alarmed by reports that thousands of vulnerable migrants, including women and children, are being held in detention centres across Libya in often inhumane conditions. Crimes, including killings, rapes and torture, are alleged to be commonplace ... I am similarly dismayed by credible accounts that Libya has become a marketplace for the trafficking of human beings ... The situation is both dire and unacceptable ... my Office is carefully examining ... opening an investigation into migrant-related crimes in Libya ... We must act ...*<sup>198</sup>

150. According to a Communication to the Office of the Prosecutor of the International Criminal Court pursuant to Article 15 of the Rome Statute, the treatment of migrants in the Central Mediterranean “**should be understood as a policy of systematic and widespread**

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<sup>196</sup> See for example United Nations Human Rights Council, “Report of the Special Rapporteur on Torture and other Cruel, Inhuman, Degrading Treatment or Punishment”, A/HRC/37/50, 23 November 2018, para. 20; <https://undocs.org/en/A/HRC/37/50>.

<sup>197</sup> Human Rights Watch, 21 January 2019, op. cit., & Amnesty International, “Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean”, August 2018; MSF, “Trading in suffering: detention, exploitation and abuse in Libya”, 23 December 2019; <https://www.msf.org/libya%E2%80%99s-cycle-detention-exploitation-and-abuse-against-migrants-and-refugees>; see also MSF videotaped testimonies of migrant abuses; <https://twitter.com/i/status/1274035006726381569>.

<sup>198</sup> International Criminal Court, 2017, “Statement of the ICC Prosecutor to the UNSC on the Situation in Libya”; <https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib>.

**attack of a pre-targeted population”** constituting crimes against humanity under Articles 5 and 7 of the Rome Statute.<sup>199</sup>

151. Within the framework of conditions that amount to torture there are a range of specific issues that have been extensively documented, as set out below.

### *Indefinite and Arbitrary Detention*

152. In the event that an individual is intercepted while crossing the Mediterranean and forcibly returned to Libya, they are criminalized under Libyan law which forbids irregular entry, stay or exit from Libya. Such individuals are subject to imprisonment without consideration of their circumstances or protection needs. In reality, rather than being charged and facing prosecution, individuals are arbitrarily and indefinitely detained in one of Libya’s formal or informal detention centres for migrants. Such detention centres are operated by the DCIM, an entity that has been funded by Italy directly and by Italy through the EU.

153. According to the UNHCR, there are 33 detention centres under control of the DCIM,<sup>200</sup> and NGOs have reported that there are as many as 10,000 individuals detained at any one time.<sup>201</sup> The OHCHR and UNSMIL observed that detainees languish in detention centres in conditions that are “generally inhuman, falling far short of international standards and, in some cases, may amount to torture”.<sup>202</sup>

154. In 2017, UNSMIL visited detention centres under the control of the DCIM in Gharyan, Tripoli, Misratah and Surman, where thousands were being detained. Investigators documented “cases of torture, ill-treatment, rape and other forms of sexual violence”, while the facilities themselves “remained overcrowded, and detainees were often

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<sup>199</sup> Omer Shatz and Dr. Juan Branco, “Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute: EU Migration Policies in the Central Mediterranean and Libya (2014-2019)”; <https://statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>; [https://www.academia.edu/39368138/EU Migration Policies in the Central Mediterranean and Libya 2014-2019 - ICC Communication](https://www.academia.edu/39368138/EU_Migration_Policies_in_the_Central_Mediterranean_and_Libya_2014-2019_-_ICC_Communication).

<sup>200</sup> United Nations High Commissioner for Refugees, “Libya: Detention centres – Active Official Detention Centres”, 21 September 2017; [data2.unhcr.org/en/documents/download/61006](https://data2.unhcr.org/en/documents/download/61006).

<sup>201</sup> InfoMigrants, “Up to 10,000 Migrants in 20 Centers Under the Sun, IOM Libya”, 3 July 2018; <http://www.infomigrants.net/en/post/10363/up-to-10-000-migrants-in-20-centers-under-the-sun-iom-libya>.

<sup>202</sup> UNSMIL & OHCHR, 20 December 2018, op. cit., p.5.

malnourished, living in poor hygienic conditions and with limited or no access to medical care”.<sup>203</sup>

***Extreme physical violence amounting to torture***

155. There has been consistent evidence that migrants and refugees have suffered extreme physical abuse, both within detention centres and outside. UNSMIL reports that the methods of torture include beatings with various objects such as water pipes, metal bars, rifle butts and sticks, forcing detainees into uncomfortable positions, such as squatting, for prolonged periods, punching and kicking, and electric shocks.<sup>204</sup>
156. Amnesty International reports that detainees are threatened with physical beatings while in detention if they do not pay the security guards.<sup>205</sup> According to the report, in March 2019 over 20 refugees and migrants, including children, were brought to an underground cell and then tortured in turn, one by one, for days, in punishment for protesting against their arbitrary detention in squalid conditions and the lack of solutions. In response to the protest, over a hundred other detainees were transferred to other detention centres.<sup>206</sup>
157. Human Rights Watch reports that physical intimidation and violence starts already at the hands of the LCG when migrants are intercepted in the Mediterranean. In the report, Human Rights Watch describes interviews with several victims, including a 34 year old mother of three from Cameroon who was in international waters and was approached by the LCG who threatened to shoot her if her boat was not tied to theirs; a 26-year-old Palestinian man whose boat was shot at by the LCG; and a report by *SOS Méditerranée* operating the *Aquarius*, that observed people jumping in the sea upon being threatened by the LCG.<sup>207</sup>

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<sup>203</sup> United Nations Security Council (UNSC), “Report of the Secretary-General on the United Nations Support Mission in Libya”, 22 August 2017; <https://unsmil.unmissions.org/sites/default/files/n1725784.pdf>.

<sup>204</sup> UNSMIL & OHCHR, 20 December 2018, op. cit., p.44.

<sup>205</sup> Amnesty International, “Europe’s shameful failure to end the torture and abuse of refugees and migrants in Libya”, 7 March 2019; <https://www.amnesty.org/en/latest/news/2019/03/europes-shameful-failure-to-end-the-torture-and-abuse-of-refugees-and-migrants-in-libya/>.

<sup>206</sup> Ibid.

<sup>207</sup> Human Rights Watch, 21 January 2019, op. cit.

### ***Sexual and Gender-Based Violence***

158. The OHCHR and UNSMIL report that the overwhelming majority of migrant and refugee women and older teenage girls are either being raped by smugglers or traffickers in Libya, or witnessing others being taken out of collective accommodations and returning distraught, physically hurt and/or with torn clothes.
159. The evidence of such incidents is confirmed by numerous interviews conducted by UNSMIL and “by a plethora of sources, such as medics and other service providers, including in countries of origin and destination”.<sup>208</sup> A report by Amnesty International, based on the testimony of 70 migrants that travelled through Libya, revealed that women were forced into rape and sexual assault in order to be released from a detention centre.<sup>209</sup>
160. Although women and girls are disproportionately affected by rape and sexual violence, UNSMIL reports that men and boys are also increasingly vulnerable to rape and other sexual abuses while in transit in Libya. Despite the prevalence of rape and other sexual violence against female and girl migrants and refugees in Libya, UNSMIL stated that they are not aware of a single case of a perpetrator being held to account or survivors receiving redress and adequate rehabilitation.

### ***Slavery and Forced Labour***

161. There have been widespread reports of slave markets operating in Libya for the sale of sub-Saharan African migrants and refugees in Libya. A CNN news report revealed footage of migrants being auctioned for \$400 per person.<sup>210</sup> The report resulted in condemnation by the United Nations Secretary General, United Nations independent experts, OHCHR and individual Member States.<sup>211</sup>

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<sup>208</sup> Ibid., p.31.

<sup>209</sup> Amnesty International, “Libya is full of cruelty: stories of abduction, sexual violence and abuse from migrants and refugees”, 11 May 2015; <https://www.amnesty.org/download/Documents/MDE1915782015ENGLISH.pdf>.

<sup>210</sup> CNN, “Libya opens investigation into slave auctions following CNN report”, 17 November 2017; [edition.cnn.com/2017/11/17/africa/libyaslave-auction-investigation/index.html](http://edition.cnn.com/2017/11/17/africa/libyaslave-auction-investigation/index.html).

<sup>211</sup> See, for example, United Nations, “Secretary General’s Statement on Reported News of Slavery in Libya”, 20 November 2017; <https://www.un.org/sg/en/content/sg/statement/2017-11-20/secretary-general%E2%80%99s-statement-reported-news-slavery-libya>; and OHCHR, “Libya Must End ‘Outrageous’ Auctions of Enslaved People, UN experts insist”, 30 November 2017; <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22475&LangID=E>.

162. The IOM also reported on the emergence of slave markets along migrant routes into Libya where sub-Saharan migrants are “being sold and bought by Libyans, with the support of Ghanaians and Nigerians who work for them”.<sup>212</sup>
163. A detailed investigative report by Time Magazine entitled “ ‘It Was As if We Weren’t Human’: Inside the Modern Slave Trade Trapping African Migrants”, published on 14 March 2019, provides thorough accounts of migrants throughout Libya forced in to labour without wages, whose captors saw them as “little more than livestock to be bought and sold”.<sup>213</sup> The report details the journey of one migrant who was sold at auction for \$200 and then forced to work on a construction site in exchange for bread.
164. Forced labour also takes place within detention centres, where detainees are exploited for physically difficult manual labour including on farms and construction sites; many are not compensated for their work while others are given only food or tiny sums of money.<sup>214</sup>

### *Torture of minors*

165. Amnesty International and Human Rights Watch have conducted and documented interviews within Libyan detention centres and amongst migrants that have departed Libya. Extensive evidence was found showing that children were also subject to severe abuse and violence by authorities within detention centres.<sup>215</sup>
166. Children, including unaccompanied and separated children, are at risk of arrest and indefinite detention in Libya. While detained, children do not receive preferential treatment and often share cells with adult detainees, increasing their vulnerability and the risk of abuse.<sup>216</sup>

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<sup>212</sup> International Organisation for Migration, “IOM Learns of ‘Slave Market’ Conditions Endangering Migrants in North Africa”, 4 November 2017; <https://www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa>.

<sup>213</sup> Time Magazine, “ ‘It Was As if We Weren’t Human.’ Inside the Modern Slave Trade Trapping African Migrants”, 14 March 2019; <https://time.com/longform/african-slave-trade/>.

<sup>214</sup> UNSMIL & OHCHR, 20 December 2018, op. cit., p.47.

<sup>215</sup> Human Rights Watch, 21 January 2019, op. cit., & Amnesty International, “Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean”, August 2018; <https://www.amnesty.org/download/Documents/EUR3089062018ENGLISH.pdf>.

<sup>216</sup> Amnesty International, “Amnesty International Report 2013. The State of the World’s Human Rights”; [http://files.amnesty.org/air13/AmnestyInternational\\_AnnualReport2013\\_complete\\_en.pdf](http://files.amnesty.org/air13/AmnestyInternational_AnnualReport2013_complete_en.pdf); United Nations High Commissioner for Refugees (UNHCR), “External Update – May 2014 UNHCR Libya”, May 2014; <http://www.tawergha.org/docs/2014-05-00-libya-unhcr-report-on-internally-displaced-persons-from-tawergha-english.pdf>.

167. A needs assessment conducted by UNICEF in 2016 documented the “appalling situation women and children face” and, although migrant women and children often tried to travel together in order to better protect themselves along the way, guards in detention facilities reportedly often separate men, women and children from one another once they arrive at detention centres, which leaves minors vulnerable to abuse either by guards or fellow detainees.<sup>217</sup> Migrant and asylum-seeking children found to be in Libya irregularly are never brought before a judge.<sup>218</sup>
168. During a 2013 visit to the Towisha “holding centre” outside of Tripoli, Amnesty International found that most of the minors held at the facility were at least 16, although it found two unaccompanied Somali children aged 10 and 13.<sup>219</sup>
169. A year later, Amnesty International researchers also identified approximately 20 unaccompanied children, some as young as 12, from Somalia and Eritrea, who were detained alongside adults at Al-Hamra, one of the largest immigration detention centres in the country, near Gharyan, which as of November 2014 was run by the 9th Brigade, a militia nominally under the control of the Ministry of Defence.

#### **J. Funding and support from Italy and the EU has not improved the conditions in Libya**

170. Although the stated objective of the funding and support from both Italy and the EU to the Libyan authorities is to support a migration management system in Libya that is compliant with international standards,<sup>220</sup> it is clear that the human rights violations in Libya have continued.
171. Despite the severity of the widely documented violations committed by Italy’s cooperating Libyan partners and the EU’s influence over Italy, the funding to Libya

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<sup>217</sup> United Nations International Children's Emergency Fund (UNICEF), “A Deadly Journey for Children: The Central Mediterranean Migration Route”, February 2017;  
[https://www.unicef.org/publications/files/EN\\_UNICEF\\_Central\\_Mediterranean\\_Migration.pdf](https://www.unicef.org/publications/files/EN_UNICEF_Central_Mediterranean_Migration.pdf).

<sup>218</sup> Amnesty International, “Libya: Human Rights Abuses Continue as Country Descends into Chaos. Amnesty International Submission to the UN Universal Periodic Review”, May 2015;  
<https://www.amnesty.org/download/Documents/MDE1900032015ENGLISH.pdf>.

<sup>219</sup> Amnesty International, “Amnesty International Report 2013. The State of the World’s Human Rights”, May 2013; [http://files.amnesty.org/air13/AmnestyInternational\\_AnnualReport2013\\_complete\\_en.pdf](http://files.amnesty.org/air13/AmnestyInternational_AnnualReport2013_complete_en.pdf).

<sup>220</sup> European Commission, “EU Emergency Trust Fund for Africa in Libya”,  
[https://ec.europa.eu/trustfundforafrica/region/north-africa/libya\\_en](https://ec.europa.eu/trustfundforafrica/region/north-africa/libya_en).

continues to be implemented without procedural safeguards, substantive guarantees, risk assessments to detailing of relevant human rights criteria or benchmarks necessary to ensure that the EU and its Member States do not contribute to Libyan violations.

172. On 27 April 2020 a detailed complaint was submitted to the European Court of Auditors concerning the mismanagement of EU funds by the EU Trust Fund for Africa.<sup>221</sup> The complaint demonstrates that the funding from Italy and the EU has entirely failed to improve human rights conditions for migrants and refugees in Libya and has in fact contributed to the capacity of the Libyan authorities to maintain abusive practices.

173. The complaint makes clear that the absence of any concrete measures to monitor and review human rights impacts, as well as the harmful impacts contributed by the EU through its support to Italy's cooperation with Libya, renders the EU in breach of its human rights in accordance with obligations under the treaty on the European Union, the Treaty on the Functioning of the European Union and the EU Charter of Fundamental Rights.

174. In relation to the Libyan detention centres, the EU denies providing direct funding for the operation of these centres.<sup>222</sup> Following an airstrike on the Tajoura detention centre, EU Spokesperson Maja Kocijancic stated, "Our position is clear, the conditions in which migrants are held in detention centres are unacceptable and detention centres should be closed". However, despite stating that detention centres should be closed, it is clear that both Italy and the EU have both funded the refurbishment of Libyan detention centres and

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<sup>221</sup> Global Legal Action Network (GLAN), Association for Juridical Studies on Immigration (ASGI) and Italian Recreational and Cultural Association (ARCI), "Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's Support to Integrated Border and Migration Management in Libya's Programme", 27 April 2020; <https://www.statewatch.org/news/2020/apr/eu-libya-legal-complaint-finance-27-4-20.pdf>.

<sup>222</sup> Responding to a question about the EU's role in Libyan detention facilities, raised in the European Parliament on 5 October 2017, European Commissioner for European Neighbourhood Policy and Enlargement Negotiations Johannes Hahn said, "The EU does not fund the management of these centres but supports international organisations to improve access to life saving protection services and assistance (e.g. by providing sanitation or ventilation, identifying the most vulnerable cases in those centres) as well as to develop alternatives to detention which will serve as spaces where the most vulnerable cases can receive special care 24/7": European Parliament, "Answer to Written Question: Answer Given by Mr Hahn on Behalf of the Commission", 5 October 2017; <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-004251&language=EN>.



funded the distribution of aid within these facilities, in order to keep them up and running.<sup>223</sup>

175. On 3 February 2017, the European Council published the Malta Declaration which stated that among the European Council's priorities would be to "ensure adequate reception capacities and conditions in Libya for migrants".<sup>224</sup>

176. Yet reports about appalling conditions, including torture, abuse and human rights violations, are rife,<sup>225</sup> and a 2014 HRW report found that the EU and Italy had committed some 12 million EUR to the centres for the following four years.<sup>226</sup>

177. As part of its European Neighbourhood and Partnership Instrument (ENPI) programme, the EU also announced in January 2014 a € 10 million programme to finance a "rights-based migration management and asylum system in Libya", including improving detention conditions and reviewing administrative procedures.<sup>227</sup>

178. In relation to Italy's bilateral support for the detention centres in Libya, the MoU itself stipulates, without any conditions or reservations, that the adaptation and financing of reception centres will be enabled through resources and funds made available by Italy and the European Union,<sup>228</sup> and that this would include "training of the Libyan personnel

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<sup>223</sup> Human Rights Watch (HRW), "Libya: Whipped, Beaten, and Hung from Trees", 22 June 2014; <http://www.hrw.org/news/2014/06/22/libya-whipped-beaten-and-hung-trees>; European Commission (EC), "Supporting Human Rights-Based Migration Management and Asylum System in Libya", 20 January 2014, [http://europa.eu/rapid/press-release\\_MEMO-14-26\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-26_en.htm); Amnesty International, "Amnesty International Report 2013. The State of the World's Human Rights. London", May 2013; [http://files.amnesty.org/air13/AmnestyInternational\\_AnnualReport2013\\_complete\\_en.pdf](http://files.amnesty.org/air13/AmnestyInternational_AnnualReport2013_complete_en.pdf).

<sup>224</sup> Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, Statement of the European Council, 3 February 2017; <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>.

<sup>225</sup> European Parliament, Parliamentary Questions, "ICC investigation into Libyan detention centres funded by the EU", 27 June 2017; [https://www.europarl.europa.eu/doceo/document/E-8-2017-004251\\_EN.html#defl](https://www.europarl.europa.eu/doceo/document/E-8-2017-004251_EN.html#defl).

<sup>226</sup> Human Rights Watch (HRW), "Libya: Whipped, Beaten, and Hung from Trees", 22 June 2014; <http://www.hrw.org/news/2014/06/22/libya-whipped-beaten-and-hung-trees>.

<sup>227</sup> European Commission (EC), "Supporting Human Rights-Based Migration Management and Asylum System in Libya", 20 January 2014; [http://europa.eu/rapid/press-release\\_MEMO-14-26\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-26_en.htm).

<sup>228</sup> MoU preamble "reaffirming the resolution determination to cooperate in identifying urgent solutions to the issue of clandestine migrants crossing Libya to reach Europe by sea, through the provision of temporary receptions camps in Libya, under the exclusive control of the Libyan Ministry of Home Affairs".

within the ... reception centres to face the illegal immigration conditions”.<sup>229</sup> The Italian government therefore had a clear and explicit intention from the outset of its agreements with Libya, to help fund and support the creation of the detention centres throughout the country in which severe human rights violations have taken place.

179. The OHCHR noted that, between the report “Detained and Dehumanized” published in December 2016 and the subsequent report “Desperate and Dangerous” published in December 2018, the “situation has not improved in the past two years, despite overwhelming evidence of horrific abuses and increased attention given to the issue at global and regional levels”.<sup>230</sup> The OHCHR concluded that the Libyan authorities have been unable or unwilling to prevent the ongoing abuse suffered by migrants and refugees.

180. On 14 November 2017, after UN human rights monitors visited four detention centres in Tripoli, the UNHCR stated that “the increasing interventions of the EU and its member states have done nothing so far to reduce the level of abuses suffered by migrants ... Our monitoring, in fact, shows a fast deterioration in their situation in Libya”.

181. In the 2020 annual report of the UNHCR on the situation of human rights in Libya, it was noted that the Libyan Ministry of the Interior lacked the ability to exercise control over the detention centres.<sup>231</sup> The report notes that although the Ministry of Interior ordered the DCIM to close three migrant detention centres (in Misrata, Tajoura and Khoms) on 1 August 2019, Tajoura and Khoms detention centres remained open as at 6 December 2019, and the Libyan Coast Guard continued to hand over migrants and refugees intercepted at sea to these centres.

182. On 7 June 2019, OHCHR called upon the GNA to immediately launch an independent investigation to locate hundreds of migrants that went missing between 30 April and 23 May 2019 that were allegedly sent to Khoms detention centre, but were never found. To date, no independent investigation has been launched. This situation is of serious concern,

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<sup>229</sup> MoU article 2(2) and (3).

<sup>230</sup> UNSMIL & OHCHR, 20 December 2018, op. cit, p.4.

<sup>231</sup> Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, “Situation of human rights in Libya, and the effectiveness of technical assistance and capacity-building measures received by the Government of Libya”, 23 January 2020, p.8; [https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_43\\_75\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_43_75_E.pdf).

as migrants and refugees continue to be particularly vulnerable to trafficking or to being sold to smugglers, including for sexual exploitation.

183. The UNHCR annual report suggests that the number of migrants and refugees dying in the Mediterranean upon leaving Libya has in fact increased as a result of the shutdown of Operation Sophia in March 2019, and due to the continued criminal and administrative proceedings by the Italian government to deter independent search and rescue operations.

184. The report notes, “in total, there were at least 743 known deaths in the Central Mediterranean in 2019, with the death rate steadily increased over each of the past three years”. The sanctioning of independent search and rescue operations has also manifested in direct threats from the LCG. On 26 October, alleged members of the LCG threatened a humanitarian search and rescue vessel and fired shots in the air as the vessel attempted to rescue 90 migrants off the coast of Libya. These actions led many of the migrants to jump overboard before the vessel eventually rescued them.<sup>232</sup>

185. The funding from the EU Trust Fund has also been extensively criticised by human rights NGOs for contributing to a deterioration of human rights conditions for migrants and refugees in Libya. Amnesty International has stated, “The EU member states have contributed in many different ways to the increased capacity of the Libyan authorities to intercept men, women and children at sea and take them back to Libya where they are arbitrarily placed in detention centers where torture, exploitation and sexual violence are widespread.”<sup>233</sup>

186. The EUTF has not been conditioned on the Libyan authorities’ closing the detention centres and releasing the thousands of people unlawfully detained. Instead, EU governments have maintained that the EUTF’s value is to improve the conditions within detention centres. However, Amnesty International and Human Rights Watch have both concluded that the EUTF has not improved conditions, and has instead facilitated their

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<sup>232</sup> UNSMIL & OHCHR, 20 December 2018, op. cit., p.8.

<sup>233</sup> Forbes, “Human Rights Organizations Say EU Money Is Responsible For The Plight Of Refugees In Libya”, 16 July 2019; <https://www.forbes.com/sites/freylindsay/2019/07/16/human-rights-organizations-say-e-u-money-is-responsible-for-the-plight-of-refugees-in-libya/#65dab4dc7b63>.

continuation.<sup>234</sup> In a statement on 11 July 2019, the International Organization for Migration (IOM) and the UN High Commissioner for Refugees (UNHCR) called for all funding to be conditional on closure of the centres, with a range of proposals to allow immediate release of detainees.<sup>235</sup> To date, no such condition has been imposed.

187. The failure of the EU and Italian funding and assistance to the Libyan authorities to improve the human rights situation for migrants and refugees has been partly attributed to the overall dysfunctional security situation throughout the country as a result of continued armed conflict.

188. The OCHCR and UNSMIL report stated, “Years of armed conflict and political divisions have weakened Libyan institutions, including the judiciary, which have been unable, if not unwilling, to address the plethora of abuses and violations committed against migrants and refugees by smugglers, traffickers, members of armed groups and State officials, with near total impunity.”<sup>236</sup>

189. This assessment was echoed by the UNHCR which stated, “Armed groups, including those integrated under State institutions, continued to be primarily responsible for human rights violations and abuses and violations of international humanitarian law. National institutions were unable, and in some cases unwilling, to ensure accountability or to end impunity.”<sup>237</sup> The lack of a stable and competent government, and the continued armed conflict in Libya, have made ineffective any efforts by the Italian government, or through the EU Trust Fund, to improve the human rights conditions of migrants and refugees in Libya.

190. In October 2019, the UK Foreign Affairs Committee of the House of Commons explicitly stated that the EU’s migration deals with Libya had fuelled human rights abuses, strengthened armed groups and undermined stability in Libya in order to achieve the short-term “win” of reducing migrant numbers. The full statement reads:

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<sup>234</sup> Amnesty International, “European Union/Libya: Act Now to Save Lives”, 12 July 2019; <https://www.amnesty.org/en/latest/news/2019/07/european-union-libya-act-now-to-save-lives/>, and Human Rights Watch, 21 January 2019, op. cit.

<sup>235</sup> UNHCR & IOM, “UNHCR and IOM joint statement: International approach to refugees and migrants in Libya must change”, 11 July 2019; <https://www.unhcr.org/news/press/2019/7/5d2765d04/unhcr-iom-joint-statement-international-approach-refugees-migrants-libya.html>.

<sup>236</sup> UNSMIL & OHCHR, 20 December 2018, op. cit., p.4-5.

<sup>237</sup> UNHCR Annual Report, 23 January 2020, op. cit., p.14.

*The EU's migration deals with Libya have achieved the short-term political "win" of cutting migrant numbers, but at the cost of fuelling human rights abuses, strengthening armed groups, and undermining stability in the longer term. There is compelling evidence of large-scale arbitrary detention, torture and sexual violence against migrants, and we are concerned by the evidence that UK funding could be contributing to these abuses. We recommend that the UK should put in place robust monitoring and safeguards to ensure that its funding to migration programmes in Libya is not contributing to abuses, as well as to strengthen protection for migrants in Libya, and should press its European partners to do the same. Ensuring close dialogue on migration with European partners after Brexit will help the UK to make this case. In its response to this report, the Government should set out its assessment of how far human rights measures within its assistance to the Libyan Coastguard have improved this force's human rights performance, including actions taken, dates, and quantifiable measures.*

191. The evidence overall demonstrates that, despite statements by both the EU and Italy that the relationship with Libyan authorities is concerned with human rights, the enormous amounts of funding and support have systematically contributed towards human rights violations and improved the capacity of Libyan officials to sustain abusive practices. Despite a declaration of opposition to Libyan detention centres, the Italian and EU authorities have actively contributed to the maintenance and refurbishment of these centres, and have implemented no reliable safeguards, risk assessments, criteria or benchmarks to ensure that human rights practices are secured.

#### **K. Renewal of the MoU in February 2020**

192. Within the three years that the original MoU was agreed for, at least 40,000 people, including thousands of children, have been intercepted by the LCG and forcibly returned to Libya.
193. Despite the well-documented and extensive human rights violations related to these interceptions, the government of Italy made a decision to renew the MoU with Libya in October 2019. The Italian Foreign Minister, Luigi Di Maio, told the Italian parliament that

it would be “unwise for Italy to break off its agreement with Libya on handling asylum seekers and combating human trafficking”.<sup>238</sup>

194. The MoU was renewed and extended for a further three years from 2 February 2020 with the same conditions, and the Italian government continues to help facilitate the interception of migrants crossing the Mediterranean from Libya.

195. The decision to renew the MoU has been widely and internationally criticised, including by UN institutions and NGOs concerned with human rights. In a statement on 19 February 2020 entitled “IOM Calls on the International Community for Urgent Action to Find Alternatives to Disembarkation in Libya”, the IOM called for the international community, including the European Union, to find alternative disembarkation mechanisms for migrants fleeing from Libya, hours after Tripoli’s main port was heavily shelled. The IOM Libya Chief of Mission stated, “Libya cannot wait ... it is time for concrete action to ensure lives rescued at sea are taken to ports of safety, and to end the system of arbitrary detention”.<sup>239</sup>

196. The IOM refers to evidence documented by the UN relating to the abuse, torture and disappearances of migrants in Libya and the brutal conditions within Libyan detention centres, and concludes that a new approach is needed.

197. Amnesty International and Human Rights Watch have both stated that Italy has become complicit in human rights violations through the continued facilitation of migrants crossing the Mediterranean and their forced return to Libya. In a statement entitled “Libya: Renewal of migration deal confirms Italy’s complicity in torture of migrants and refugees”, Amnesty International stated that **the decision of the Italian government to ignore the horrific abuses inflicted on tens of thousands of people in Libya and renew the MoU**

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<sup>238</sup>The Guardian, ‘Italy to renew anti-migration deal with Libya’, 31 October 2019, <https://www.theguardian.com/world/2019/oct/31/italy-to-renew-anti-migration-deal-with-libya>

<sup>239</sup> International Organization for Migration, “IOM Calls on the International Community for Urgent Action to Find Alternatives to Disembarkation in Libya”, 19h February 2020; <https://www.iom.int/news/iom-calls-international-community-urgent-action-find-alternatives-disembarkation-libya>.

**was a “shameful display of how far EU governments are prepared to go to keep migrants from Europe’s shores”<sup>240</sup>**

198. The accusation of complicity was echoed by Human Rights Watch in a statement dated 12 February 2020,<sup>241</sup> where it stated that, because the extent of the human rights violations in Libya is known to the Italian government, the decision to renew the MoU nonetheless makes Italy complicit in the abuse. A spokesperson for Human Rights Watch stated, “Italy can’t paper over its complicity in the suffering of migrants and refugees who fall into the hands of the Libyan Coast Guard”. The statement concludes that the Italian government must insist on the closure of detention centres, increase evacuations from Libya and resume a leadership role in saving lives in the Mediterranean.

199. Despite the international condemnation of the renewal of the MoU between Italy and Libya, the terms and conditions of the agreement remain in their unchanged form and the Italian authorities continue to provide support to the LCG to intercept migrants crossing the Mediterranean.

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<sup>240</sup> Amnesty International, “Libya: Renewal of migration deal confirms Italy’s complicity in torture of migrants and refugees”, 30 January 2020; <https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/>.

<sup>241</sup> Human Rights Watch, “Italy: Halt Abusive Migration Cooperation with Libya”, 12 February 2020; <https://www.hrw.org/news/2020/02/12/italy-halt-abusive-migration-cooperation-libya>.

## THE LAW

### A. Introduction

200. In this section we first demonstrate that the facts, as set out above, establish that the conditions for an inquiry procedure under Article 20 of the CAT are satisfied because there exists “reliable information” containing “well-founded indications” that “torture” within the meaning of Article 1 is being “systematically practiced” on refugees and migrants.
201. We then discuss the jurisdictional concept of “territory” for purposes of Article 20(1). We submit that this term is not limited to the national territory of a State party but refers to “**any territory** under its **jurisdiction**” (CAT Art. 2(1), our emphasis). The test for whether a State party is exercising jurisdiction outside its borders centres on the notion of “*de facto* effective control” over the individuals or area in question (GC 2, § 16).
202. We show that Italy is exercising *de facto* control over refugees and migrants in the Central Mediterranean by organizing their pull-backs through a proxy force, the LCG, which is funded, equipped, trained and directed by Italy under the framework of an international agreement whose purpose is to stem “illegal migration” by providing Libya with the necessary resources for this purpose.
203. The Committee has found that interdictions on the high seas that are accomplished by a State party, in concert with a foreign country with which it has concluded an international agreement governing border-control cooperation, come under the purview of the CAT for jurisdictional purposes (*J.H.A. v. Spain (Marine 1)*, § 8.2).
204. Italy’s obligations under the CAT are therefore fully engaged in respect of the widespread and systematic torture of refugees and migrants pulled back to Libya through its proxy the LCG, and an Article 20 inquiry procedure is warranted.
205. In addition to the jurisdictional arguments arising under the Committee’s concept of extraterritorial conduct, we also discuss how Italy can be held accountable through breaches of its positive obligations to prevent torture and, alternatively, for breaches of international law principles enshrined in the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.



206. Finally, we show that the various reasons Italy has given to justify its pull-back strategy including “countering of trafficking networks” and other self-serving statements made in its correspondence with the UN Special Rapporteurs, are without merit.

## **B. Argument**

207. Article 20(1) of the CAT provides:

*If the Committee receives **reliable information** which appears to it to contain **well-founded indications** that **torture** is being **systematically practised** in the **territory** of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned (our emphasis).*

208. Italy is subject to the Committee’s inquiry procedure under Article 20 because it did not opt out of this procedure upon ratification of the CAT in accordance with Article 28(1).<sup>242</sup>

### **a. The evidentiary standards of Article 20(1) are satisfied**

209. As we demonstrated in the factual section, the torture of refugees and migrants in formal and informal detention centres in Libya has been conclusively documented by United Nations bodies including the OHCHR and UNSMIL, as well as international NGOs such as HRW, AI and MSF (see Sections I and J).

210. None of the factual findings of these organisations have ever been contested in any relevant context. On the contrary, Italian and European officials have publicly acknowledged the accuracy of the information (see Section J). The Italian Deputy Minister

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<sup>242</sup> See <https://indicators.ohchr.org/>.

of Foreign Affairs, Mario Giro, speaking to the press in 2017, stated that “[r]eturning those people is like condemning them to hell.”<sup>243</sup>

211. Internal EU documents reveal the uncontested awareness on the part of EU officials (and by implication of Italian officials) of the situation awaiting refugees and migrants in Libya.<sup>244</sup> The President of the European Commission, Jean-Claude Juncker, said in his State of the Union Address in 2017, **“Europe has a responsibility – a collective responsibility – ... to put an end to this scandalous situation [of inhumane conditions in detention or reception centres] that cannot be made to last.”**<sup>245</sup>

212. Several United Nations Special Rapporteurs (SR) consider that the grave abuses of refugees and migrants have been factually established. We recall that they include the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and the Special Rapporteur on trafficking in persons (see Section D below).<sup>246</sup>

213. Similarly, the ICC prosecutor informed the United Nations Security Council on 9 May 2017 that she was considering the “feasibility of opening an investigation into migrant-related crimes in Libya should the Court’s jurisdictional requirements be met”.<sup>247</sup> She repeated her concerns in November 2017, noting “reports of unlawful killings, including the execution of detained persons; kidnapping and forced disappearances; torture; prolonged detentions without trial or other legal process; and arbitrary detention, torture, rape and other ill-treatment of migrants in official and unofficial detention centres”.<sup>248</sup>

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<sup>243</sup> Mario Giro, Deputy Minister of Foreign Affairs, Italy, quoted in: Marco Menduni, *La Stampa*, 6 August 2017, “Giro: ‘Fare rientrare quelle persone vuol dire condannarle all’inferno’”; <https://www.lastampa.it/2017/08/06/italia/giro-farerientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzfF1fNGFCMADN/pagina.html>.

<sup>244</sup> The Guardian, “The great European refugee scandal: Evidence obtained by the Guardian exposes a coordinated and unlawful EU assault on the rights of desperate people trying to cross the Mediterranean”, 12 March 2020; <https://www.theguardian.com/world/2020/mar/12/revealed-the-great-european-refugee-scandal>.

<sup>245</sup> Juncker, 2017, State-of-the-union address; [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_17\\_3165](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165).

<sup>246</sup> See <https://spcommreports.ohchr.org/>.

<sup>247</sup> Fatou Bensouda, Prosecutor of the ICC, 9 May 2017, Statement to the UNSC on the Situation in Libya; <https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib>.

<sup>248</sup> ICC, 2017, “Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)”; [https://www.icc-cpi.int/Pages/item.aspx?name=otp\\_lib\\_unsc](https://www.icc-cpi.int/Pages/item.aspx?name=otp_lib_unsc).

214. In a letter of 13 February 2020 to the Italian Minister of Foreign Affairs, the CoE Commissioner for Human Rights called for the immediate suspension of Italian collaboration with the LCG because of “the **great amount of evidence** pointing to serious human rights violations faced by migrants and asylum seekers returned there ... (our emphasis).”<sup>249</sup> In his report *Lives Saved. Rights Protected. Bridging the protection gap for refugees and migrants in the Mediterranean*, the CoE Commissioner considered the serious human rights violations against refugees, asylum seekers and migrants, to be an established fact.<sup>250</sup>

215. In its Concluding observations on the fifth and sixth periodic reports of Italy the Committee itself expressed serious concerns “**at the lack of assurances that cooperation for the purpose of enhancing the operational capabilities of the Libyan Coast Guard or other Libyan security actors would be reviewed in light of possible serious human rights violations**” including specifically by the LCG and the DCIM.<sup>251</sup>

216. Therefore, we consider it established that the criteria of “reliable information” containing “well-founded indications” of the systematic abuse of migrants, for purposes of Article 20 of the CAT, are satisfied.

#### **b. The treatment of migrants amounts to “torture” under Article 1**

217. We also consider it established that the treatment to which migrants are subjected amounts to torture within the definition of Article 1 of the CAT.

218. Article 1 of the CAT provides:

*For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for*

<sup>249</sup> Available at <https://www.coe.int/en/web/commissioner/-/commissioner-urges-italy-to-suspend-co-operation-activities-with-libyan-coast-guard-and-introduce-human-rights-safeguards-in-future-migration-co-operation>

<sup>250</sup> CoE Commissioner for Human Rights, *Lives Saved. Rights Protected. Bridging the protection gap for refugees and migrants in the Mediterranean*, June 2019, <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87>

<sup>251</sup> UN Committee against Torture, “Concluding observations on the fifth and sixth periodic reports of Italy”, CAT/C/ITA/CO/5-6, 17 December 2017, para. 22., [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/ITA/CO/5-6&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/ITA/CO/5-6&Lang=En)

*an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

***Severity of pain or suffering***

219. In Libya, refugees and migrants suffer extreme physical violence at the hands of the Libyan authorities. The treatment includes drownings, beatings, burnings, electrical shocks, summary executions, forced labour and other severe abuse, the details of which were provided above in Section I.
220. Sexual and gender-based violence in detention, including rape of women and girls, is widespread and systematic (see Section I).
221. Indefinite and arbitrary detention, under conditions that are so extreme that they are life-threatening, is the norm. A German diplomat stationed in Niger described the conditions in migrant detention centres in Libya as “concentration-camp like” in his internal correspondence with Chancellor Angela Merkel<sup>252</sup> (see Section I).
222. Detainees are deprived of necessary medical treatment, and are systematically exposed to undernourishment, even starvation. Conditions are grotesquely unhygienic and detainees, including pregnant women and children, become ill and die from preventable diseases (see Section I).
223. It is beyond dispute that such forms of treatment and conditions cause “severe pain or suffering” both “physical” and “mental” rising to the level of torture within the meaning of Article 1 of the CAT.

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<sup>252</sup> German diplomat stationed in Niger in an internal cable to Angela Merkel, 29 January 2017, quoted in: Deutsche Welle, 2017, *Libyan Trafficking camps are hell for refugees, diplomats say*; <https://p.dw.com/p/2WaEd>.

***Intentional infliction by a public official***

224. The treatment described above occurs in whole or in part while refugees and migrants are detained or otherwise in the custody of Libyan authorities, initially on board or under direct control of LCG vessels where the abuses begin, and subsequently inside formal and informal migrant detention centres operated by the DCIM.
225. We recall that the Libyan authorities referred to here are operating at the request of, and with the resources made available by Italy, under the framework of a bilateral agreement. See Facts Sections A – G.
226. It would be difficult to maintain that regular beatings and rapes by prison guards or the systematic starvation of persons in detention including women and children do not meet the broadly defined intentionality requirement of CAT Article 1 (“intentionally inflicted ... for any reason based on discrimination of any kind”). We consider this element to be met.
227. Moreover, persons who are intercepted in the Mediterranean and pulled back to Libyan territory by the LCG are by definition in the custody of Libyan law enforcement authorities. We consider the “public official” element of the definition of torture to be satisfied.
228. We conclude that all the relevant elements of the definition of torture as it is defined in Article 1 of the CAT are fulfilled.

**c. The requirement of a “systematic practice” is met**

229. The Committee has provided the following definition of “systematic practice” of torture for purposes of Article 20(1):

*The Committee considers that torture is practised systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be **habitual, widespread and deliberate** in at least a **considerable part of the territory of the country in question**. ... (our emphasis).<sup>253</sup>*

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<sup>253</sup> OHCHR, Confidential inquiries under article 20 of the Convention against Torture; <https://www.ohchr.org/EN/HRBodies/CAT/Pages/InquiryProcedure.aspx>.

230. As the factual section demonstrates, there is a wealth of information showing that the torture of refugees and migrants across Libya is widespread, routine, has manifested over a prolonged period of time lasting for years, and occurs in the multiple different geographical locations where the formal and informal detention centres are located. We recall that there are approximately 29 formal detention centres across different parts of the country (see Section I).

231. We therefore consider it uncontroversial that torture is a “systematic practice” within the meaning of Article 20(1) of the CAT.

**d. Extraterritorial jurisdiction: Italy is exercising *de facto* control over migrants in the Central Mediterranean through its proxy, the LCG**

***Extra-territorial jurisdiction under the CAT***

232. The term “territory”, for purposes of Article 20(1) of the Convention, is a jurisdictional term which must be construed as reaching any conduct for which a State party is responsible, even extraterritorially, by virtue of exercising control of an area or persons.

233. Article 2(1) of the CAT provides that “[E]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” (our emphasis).

234. Article 2(2) provides that “[N]o exceptional circumstances whatsoever ... may be invoked as a justification of torture”.

235. The Convention’s jurisdictional provision at Article 2(1) assumes that there will be situations where States parties exercise jurisdiction beyond their borders and it expressly extends the protections afforded by the Convention to those situations, i.e. to “any territory” controlled by the State party.

236. While the Committee's past practice under Article 20 has concerned allegations of torture occurring within the national territory of a State party,<sup>254</sup> nothing in its jurisprudence nor in the CAT itself can be construed as limiting the scope of the jurisdictional term "territory" of that article to the territory of the State party. On the contrary, as we demonstrate below, the Committee has clarified that its interpretation of the extraterritorial application of the CAT applies to all provisions of the Convention.
237. In General Comment No. 2, the Committee explained that the jurisdiction of a State party refers to any territory in which it "exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law" (GC 2, at § 16).
238. This interpretation of the jurisdictional scope of the Convention finds ample confirmation in the jurisprudence of other international bodies in relation to human rights treaties. Notably, the International Court of Justice (ICJ) has repeatedly affirmed that international human rights treaties have extraterritorial application for jurisdictional purposes.<sup>255</sup>
239. Both the UN Human Rights Committee and the European Court of Human Rights (ECtHR) have developed tests for jurisdiction based on a state's authority and control over an area or persons.
240. In General Comment no. 31, the Human Rights Committee stated that "... a State party must respect and ensure the rights laid down in the Covenant **to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party**" (our emphasis).<sup>256</sup>
241. In its recent General Comment no. 36 on the right to life, the Human Rights Committee explained that jurisdiction under the International Covenant on Civil and Political Rights (ICCPR) includes persons located outside the territory of the State party whose rights are

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<sup>254</sup> Turkey 1994, Egypt 1996, Peru 2001, Sri Lanka 2002, Mexico 2003, Federal Republic of Yugoslavia (Serbia and Montenegro) 2004, Brazil 2008, Nepal 2012, Lebanon 2014, Egypt 2017; [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Inquiries.aspx](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Inquiries.aspx).

<sup>255</sup> ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, Judgment, paras 400-401; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, para 111; *Armed Activities on the Territory of the Congo*, Judgment, para 216; Provisional Measure in the case of *Georgia v. Russian Federation*, No. 35/2008, para 109. See H. Battjes, "Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses", *Netherlands Yearbook of International Law* 2016 (2017).

<sup>256</sup> CCPR, General Comment no. 31, § 10.

“**affected**” by a State party’s “military or **other activities**, in a direct and reasonably foreseeable manner” (our emphasis).<sup>257</sup>

242. In the same paragraph of General Comment no. 36, the Human Rights Committee emphasised that “States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, **and of those individuals who find themselves in a situation of distress at sea**, in accordance with their international obligations on rescue at sea” (our emphasis).<sup>258</sup>

243. In a Joint General Comment, the UN Committee on the Rights of the Child and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) provided specifically in relation to migration control that “[j]urisdiction **cannot be limited/excluded in zones or areas subjected to migration control operations, including international waters or other transit zones ...**” (our emphasis).<sup>259</sup>

244. Similarly, the jurisprudence of the ECtHR makes clear that, for jurisdictional purposes, a member state’s “territory” extends to areas over which it exercises “**effective control and authority**”, even if outside of its geographical boundaries.<sup>260</sup>

245. In *Issa and Others v. Turkey* (application no. 31821/96) it was stated that:

*Article 1 of the Convention could not be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.*

*The Court consequently has to ascertain whether the applicants’ relatives had been **under the authority and/or effective control, and therefore within the jurisdiction**, of the respondent State as a result of the latter’s extra-territorial acts* (our emphasis).

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<sup>257</sup> CCPR, General Comment no. 36, § 63. This formulation provides for a broad scope of state action triggering extraterritorial human rights liability based on the **foreseeable impact** of state action on individuals outside a state’s territory. In doing so, it arguably goes even beyond the concept of *de facto* or *de jure* control.

<sup>258</sup> CCPR, General Comment no. 36, § 63.

<sup>259</sup> Joint General Comment No. 4 of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child, at § 12.

<sup>260</sup> See *Loukidou v. Turkey* (Preliminary Objections), ECtHR, Application No. 15318/89, Judgment of 23 March 1995, para. 62; *Issa and Others v. Turkey*, Application No. 31821/96, Judgment of 16 November 2004, paras. 68 and 71; *Al-Skeini and Others v. the United Kingdom*, ECtHR, Application No. 55721/07, Judgment of 7 July 2011, para. 131; *Hirsi Jamaa and Others v. Italy*, ECtHR, Application No. 27765/09, Judgment of 23 February 2012, para. 73; *Pad v. Turkey*, ECtHR, Application No. 60167/00, Judgment of 28 June 2007, para. 53.



246. In the case of *Al-Skeini v UK* the Court affirmed the existence of jurisdiction “whenever the State, through its agents, exercises control and authority over an individual” and “when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory”.<sup>261</sup>

247. In a series of cases, the ECtHR has found that the jurisdictional link is particularly clear when the conduct of a state is governed by an international treaty providing the framework for the exercise of extraterritorial authority.<sup>262</sup>

***Extra-territorial jurisdiction specifically in the context of refoulement on the high seas: the case of J.H.A. v. Spain (Marine I)***

248. In the specific context of migrant interceptions at sea, the Committee has found that a State party exercises *de facto* control when such interceptions are organized and executed by a State party in close collaboration with the authorities of a third country (*J.H.A. v. Spain (Marine I)*, Communication no. 323/2007, § 8.2; see also *Sonko v. Spain*, Communication no. 368/2008, § 10.3).

249. In *J.H.A.*, a Spanish rescue tug sailing from Tenerife intercepted the *Marine I*, a migrant boat in distress in international waters with 369 persons on board. Under a diplomatic agreement negotiated between Spain and Mauritania in the days following the rescue, the *Marine I* was brought to Nouadhibou, Mauritania, where the passengers were allowed to disembark two weeks later. The Spanish authorities provided technical assistance with the identification, status determination and repatriation process while the migrants remained detained in a former fish processing plant in the harbour.

250. The author of the communication complained that the conditions on the *Marine I*, and the conditions in Nouadhibou where they were subsequently detained for several months, were unsanitary and overcrowded, and that the migrants had at various times had

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<sup>261</sup> *Al-Skeini and Others v. the United Kingdom*, ECtHR, Application No. 55721/07, Judgment of 7 July 2011, paras 131 *et seq.*

<sup>262</sup> See *Güzelyurtlu and others v. Cyprus and Turkey*, ECtHR [GC] Application No. 36925/07, Judgment of 29 January 2019, para. 186, summarising the reasoning in *Aliyeva and Aliyev v. Azerbaijan*, ECtHR, Application No. 35587/08, Judgment of 31 July 2014, paras. 56-57; *Güzelyurtlu and others v. Cyprus and Turkey*, *op. cit.*, para. 188; *Romeo Castaño v. Belgium*, ECtHR, Application No. 8351/17, Judgment of 9 July 2017, para. 42.

insufficient food and medical attention. According to the complainant, these conditions amounted to torture and ill-treatment in violation of Articles 1 and 16 of the CAT.

251. The complainant also alleged that, as part of the diplomatic agreement, Mauritania had been paid € 650,000 by Spain to take in the migrants, that Spain remained responsible for them because Spain had rescued them in international waters and was in charge of their supervision during the entire period of their detention in Nouadhibou.
252. Spain objected to the admissibility of the complaint on the basis that the events did not occur on Spanish territory and therefore did not engage Spain's obligations under the CAT.
253. The Committee rejected this argument, noting Spain's heavy involvement in the SAR operation and then on land in Mauritania during the processing of the migrants pursuant to the bilateral agreement with Mauritania.
254. Under these circumstances, the Committee found that Spain had exercised *de facto* control over the migrants, **triggering jurisdiction under all aspects of the Convention, including for purposes of the Committee's supervisory procedures** under the individual complaints mechanism of Article 22:

*8.2 The Committee takes note of the State party's argument that the complainant lacks competence to represent the alleged victims because the incidents forming the substance of the complaint occurred outside Spanish territory. Nevertheless, the Committee recalls its general comment No. 2, in which it states that the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. In particular, it considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention. **This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all provisions of the Convention, including article 22.** In the present case, the Committee observes that the State party maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. **In particular, the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the alleged victims during their detention in Nouadhibou.** Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the*

*complaint that forms the subject of the present communication is concerned (our emphasis).*

255. Following the above reasoning, it is clear that the notion of extraterritorial jurisdiction extends to all provisions of the CAT including those that provide for the Committee's supervisory mechanisms, such as the one at issue here, Article 20. It is also clear that, under circumstances where the State party is exercising control over migrants pursuant to a cooperation agreement with a foreign country, the State party is exercising its jurisdiction for purposes of the CAT.

256. Like the Spanish authorities in *J.H.A.*, the Italian authorities in the Central Mediterranean are exercising *de facto* control over refugees and migrants pulled back by the LCG, by virtue of an international agreement with Libya, the MoU (see Section J).

257. Arguably, the extent of Italian control over the persons in question is much more evident than in *J.H.A.*, taking into consideration the very extensive and multi-faceted material, financial and political assistance Italy is providing to Libya in this context. As the factual section established, the LCG is an entity re-created, funded, equipped, trained and is directed in real time by Italy. Although the LCG is nominally a Libyan authority, we submit that it is in fact acting as a branch of the Italian navy.

258. The UN Human Rights Council's Special Rapporteur on extrajudicial, arbitrary and summary executions has reached the same conclusion as to the extent of control exercised by Italy (and its EU partners) over interceptions in the Mediterranean. She affirmed:

*[Since the] European Union and its member States have put in place an extensive surveillance system focused on security and border patrol [and have] chosen to provide security in the Mediterranean, **the States members of the European Union ... are exercising sufficient functional control to be subject to the one obligation inextricably linked to ocean surveillance: an adequate and effective system of rescue.** This includes the implementation of the principle of non-refoulement, including to unsafe third countries, the protection of refugees and migrants, including against preventable and foreseeable loss of lives, and support to ships operated by non-governmental organizations (our emphasis).*"<sup>263</sup>

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<sup>263</sup> UN Special Rapporteur on extrajudicial, arbitrary and summary executions, "Unlawful deaths of refugees and migrants", UN Doc. A/72/335, para. 64., <https://reliefweb.int/sites/reliefweb.int/files/resources/N1725806.pdf>

259. As to the legal effects of the exercise of such extraterritorial “control”, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has stated unambiguously that it triggers the international responsibility of the controlling state<sup>264</sup>:

*States are responsible for internationally wrongful acts or omissions that are legally attributable to them, whether through direct imputation, joint responsibility or complicity, and regardless of the lawfulness of such acts or omissions under national law. Thus, States are responsible not only for territorial and extraterritorial violations committed by their own officials, or by contractors and other non-State actors under their instruction and control, but also for knowingly aiding, assisting, directing, controlling or coercing other States in committing internationally wrongful acts. **In particular, States knowingly providing instructions, directions, equipment, training, personnel, financial assistance or intelligence information in support of unlawful migration deterrence or prevention operations conducted by third States incur legal responsibility for these violations.** This also applies if such operations are conducted by non-State actors under their instructions and control (internal citations omitted, our emphasis).*

260. The extent of EU Member States’ control over the LCG – with Italy playing the most prominent role – has been conclusively documented in a report published on 17 June 2020, by a group of NGOs active in SAR operations in the Central Mediterranean. The key findings of this report include that 1) “EU aerial assets are deployed to detect migrant boats from the air and guide the so-called Libyan Coast Guard to the locations of escaping boats;” and 2) “Aerial surveillance has led to the capture of tens of thousands of people and their return to the Libyan war zone.”<sup>265</sup>

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<sup>264</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 November 2018, A/HRC/37/50 at § 56, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/347/27/PDF/G1834727.pdf?OpenElement>

<sup>265</sup> Alarm Phone, Borderline-Europe, *Mediterranea*, Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020; <https://eu-libya.info/>.

e. **Conclusion: the Committee should open an inquiry into Italy's conduct in the Central Mediterranean**

261. The question of whether a state exercises extraterritorial jurisdiction over individuals or over the territory in which they are located, must be assessed through a fact-sensitive analysis of the nature and degree of control and authority exercised by the state. Such control is particularly manifest when the authorities' power to take action is based on international legal obligations.

262. We conclude that Italy is exercising jurisdiction for purposes of the CAT by having *de facto* effective control over refugees and migrants in the Central Mediterranean and therefore comes within the Committee's inquiry powers under Article 20, for the following reasons:

- a) Italy re-created the LCG as part of its strategy to outsource pull-backs of refugees and migrants in the Central Mediterranean:
  - After the fall of the Gaddafi regime, Libya did not have any border management infrastructure capable of conducting SAR operations; the LCG needed to be re-created with Italian resources: see Facts Sections A – G.
  - After the *Hirsi* judgment, Italy could not use its own naval assets to *refoule* refugees and migrants to Libya without openly violating international law: see Facts Sections A – B.
- b) The LCG does not have the capacity to operate autonomously in its own SAR area but relies completely on Italy – directly and through EU actors – who maintains full functional and effective control over all its missions.
  - Italy's funding, equipment and training: see Facts Sections A – G.
  - Italy's personnel and equipment stationed in Libya: see Facts Sections B – E, G.
  - Italy's coordination of SAR operations: see Facts Sections B – E, G.

c) Pull-backs of migrants are carried out under the framework of an international agreement between Italy and Libya which stipulates as one of its main goals that the parties shall collaborate in the “combatting of illegal migration”.

- Italy – Libya MoU: see Facts Section K.

## **C. Other Bases of Italy’s Responsibility under International Law**

### **a. Breach of positive obligations to prevent torture**

263. In the alternative, it can be established that torture is being practised under Italian jurisdiction through the doctrine of positive obligations, under which States are under a due diligence obligation to do what they can to prevent human rights violations by others in areas where they exercise influence.<sup>266</sup>

264. Through its assistance to the LCG in the interception of migrants, the Italian government has taken steps within its own territory that not only neglect its positive obligations to prevent human rights violations, but provide proactively material assistance towards them.

265. Under the Convention against Torture, States parties have extensive positive and procedural obligations to take measures that prevent or minimize breaches of the CAT.<sup>267</sup> As we saw above, Article 2(1) enshrines a comprehensive duty to take positive steps to eradicate the practice of torture in its jurisdiction, including through “legislative, administrative, judicial or other measures.” Articles 3 to 15 of the CAT particularize these duties. In the paragraphs below, we discuss the approach to positive obligations taken by the ECtHR.

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<sup>266</sup> See Anna Liguori, *Migration Law and the Externalization of Border Controls, European State Responsibility*, Routledge 2019, in particular § 4.2 *Italy’s responsibility for violation of positive obligations*.

<sup>267</sup> See *Seeking Remedies for Torture Victims, OMCT Handbook Series Vol. 4*, 2014, section 4.7, Positive Duties under CAT.

266. In particular, the authority for establishing Italy's positive obligations can be found in several ECtHR cases. In the case of *Ilascu and Others v. Moldova and Russia* (Application no. 48787/99), the court considered the notion of positive obligations with respect to both Moldova's and Russia's jurisdiction. With regard to Moldova, the Court affirmed that even in the absence of effective control over the Transdnistrian region, Moldova still had a positive obligation under Article 1 of the Convention to take diplomatic, economic, judicial or other measures within its power and in accordance with international law to secure to the applicant's rights guaranteed by the Convention.
267. In respect of Russia, the court considered the historical, financial, economic and military ties between Russia and the Transdnistrian region and found that that was "a continuous and uninterrupted link of responsibility" which was positively determinative of Russia's territorial jurisdiction over the area, despite it being outside of Russia's sovereign territory. This principle reiterated in the cases of *Manoilescu and Dubrescu v. Romania and Russia* (Application No 60861/00) and *Treska v. Albania and Italy* (Application No. 26937/04).
268. These cases support a conclusion that the duty to take preventive or other positive action in respect of extraterritorial human rights violations originates first and foremost from the influence a state exercises in a particular situation, i.e. the power to prevent human rights violations, "even in the absence of effective control of a territory outside its borders", and that the ECtHR is receptive to claims relating to positive obligations in an extraterritorial setting.
269. In the case of *Nasr and Ghali v. Italy* (Application no. 44883/09), the court examined the positive obligation of Italy in respect of an allegation of violation of Article 3 ECHR.
270. It was determined that Italy had a positive obligation to take reasonable measures to prevent individuals from being subjected to torture or inhuman or degrading treatment, even when administered by private individuals, and that a breach of this obligation could arise when Italy had failed to take reasonable measures to prevent the materialization of a risk of ill-treatment of which they were or should have been aware. At Paragraph 283, it was stated:

§ 283. *Combinée avec l'article 3, l'obligation que l'article 1 de la Convention impose aux Hautes Parties contractantes de garantir à toute personne relevant de leur juridiction les droits et libertés*

*consacrés par la Convention leur commande de prendre des mesures propres à empêcher que lesdites personnes ne soient soumises à des tortures ou à des traitements inhumains ou dégradants, même administrés par des particuliers (Z et autres c. Royaume-Uni [GC], no 29392/95, § 73, CEDH 2001-V). La responsabilité de l'État peut donc se trouver engagée lorsque les autorités n'ont pas pris de mesures raisonnables pour empêcher la matérialisation d'un risque de mauvais traitement dont elles avaient ou auraient dû avoir connaissance (Mahmut Kaya c. Turquie, no 22535/93, § 115, CEDH 2000-III; El Masri, précité, § 198; Al Nashiri, précité, § 509).<sup>268</sup>*

271. From the ECtHR cases it is possible to conclude that a State's positive obligations in respect of torture are breached where (a) the torture occurs outside the State's sovereign territory, but the State exercises influence or a "continuous and uninterrupted link of responsibility"; and (b) there is an awareness of the risk of individuals suffering torture or ill-treatment by State or non-State actors; and (c) the State fails to take reasonable measures to prevent that risk from materializing.

272. Based on these principles, there are clear indications that Italy is in breach of its positive obligations with respect to migrants being intercepted while crossing the Mediterranean. First in respect of (a), whether Italy exercises influence or a "continuous and uninterrupted link of responsibility" in respect of migrants crossing the Mediterranean, Italy has had continuous influence over the Libyan treatment of refugees and migrants for, at least, two decades, including the following:

- i. A number of bilateral agreements were signed between Libya and Italy in order to reduce irregular migration across the Mediterranean between 2000 and 2017: see Facts Sections A – E.
- ii. In 2003 Italy helped finance the construction of a camp for irregular migrants. Technical equipment and training was provided by Italy to assist with control at

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<sup>268</sup> Unofficial English translation: § 283. Combined with Article 3, the obligation which Article 1 of the Convention imposes on Member States is to guarantee to everyone within their jurisdiction the rights and freedoms enshrined in the Convention, instructing them to take appropriate measures to prevent such persons from being subjected to torture or inhuman or degrading treatment, even when administered by individuals (Z and others v. the United Kingdom [GC], no. 29392/95, § 73, ECHR 2001 - V). State responsibility can therefore be engaged when the authorities have not taken reasonable measures to prevent the materialization of a risk of ill-treatment of which they were or should have been aware (Mahmut Kaya v. Turkey, no. 22535 / 93, § 115, ECHR 2000 - III; El Masri, cited above, § 198; Al Nashiri, cited above, § 509).



the Libyan borders. Technical meetings were held, in Rome and Tripoli, to better define support offered by Italy to Libya: see Facts Sections A – D.

- iii. In 2007, for the first time, Italian boats patrolled Libyan territorial waters to reduce irregular migration. Joint Libya and Italy maritime patrols were created. Italy provided ships to Libya. Informal negotiations between security experts and officials followed: see Facts Sections A – D.
- iv. The Friendship Treaty, a bilateral agreement signed in 2008 and entered into force in 2009, established further Italian-Libyan joint patrols, including a coordination unit. In 2010, a new technical and operational protocol was signed: see Facts Sections A – D.
- v. In 2011, a MoU was signed between Italy and the then-rebel National Transitional Council of Libya, which stipulates Italy's provision of training, technical tools and information sharing, and proposes the construction of a detention centre, for controlling the border and irregular migration: see Facts Sections A – D.
- vi. In 2017, a MoU was signed between Italy and the Libyan Government of National Accord, in which the former agreed to provide the latter training and equipment, while also investing to help improve border security and combat smuggling: see Facts Sections E and K.

273. Secondly, in respect of (b), whether there is an awareness of the risk of refugees and migrants being intercepted while crossing the Mediterranean suffering torture or ill-treatment:

- a. As set out above, the evidence that refugees and migrants risk suffering torture or ill-treatment upon return to Libya is overwhelming and has been extensively documented: see Facts Section I.
- b. In the case of *Hirsi Jamaa and Others v. Italy*, decided in 2012, Italy was found to be in breach of Article 3 ECHR on account of having forcibly returned

migrants migrants to Libya to face a risk of torture and other ill-treatment: see Facts Section B.

- c. In addition to the torture of migrants, Italy is aware that funding provided to detention centres is used for illicit activities such as extortion, forced labour, selling migrants to traffickers and armed groups using migrants for forced labour: see Facts Section J – K, and Law Section B(i).

274. Finally, in respect of (c), whether Italy has failed to take reasonable measures to prevent the harm from materializing:

- a. The Italian government invited an infamous human trafficker (Abd al Rahman al-Milad) to take part in negotiations for, and meetings on the implementation of, the MoU. The Italian government has taken no steps to prevent his exercise of power in its implementation: see Facts Section F.
- b. The Italian government renewed the MoU with Libya in February 2020 without any alteration or amendment, despite international pressure to make such a renewal conditional on compliance with human rights law: see Facts Section K.
- c. Funding and support from the Italian government has not improved the conditions in Libyan detention centres: see Facts Section J.
- d. The Italian government has criminalised and disrupted independent search and rescue operations, and refused to permit migrants to disembark: see Facts Section H.
- e. The Italian government has actively contributed to the continuation of the harm): see Facts Section K.

275. In conclusion, although the torture suffered by migrants intercepted by the LCG and forcibly returned to Libya takes place outside Italian sovereign space, it may be considered as a practice taking place within Italian jurisdiction based on the doctrine of positive obligations because the torture occurs in an area where Italy has influence or a “continuous and uninterrupted link of responsibility”, there is awareness of the risk that

the migrants will suffer torture or other ill-treatment, and Italy has failed to take reasonable steps to prevent the risk from materializing.<sup>269</sup>

**b. Breach of principles of international law on state responsibility for internationally wrongful acts**

**i. Articles 40 & 41 ASR**

276. The issue of responsibility within the context of the Italian role in the pull-backs of migrants crossing the Central Mediterranean may also be evaluated through consideration of Draft Articles on Responsibility of States for Internationally Wrongful Acts ('ASR'), which seek to codify and develop the basic rules of international law concerning the responsibility of States for internationally wrongful acts.

277. In this section the relevance of Articles 40 and 41 is considered, and the relevance of Article 16 is discussed further below.

278. Articles 40 & 41 state:

Article 40. Application of this chapter

*1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.*

*2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.*

Article 41. Particular consequences of a serious breach of an obligation under this chapter

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<sup>269</sup> According to Liguori, *supra*, all jurisdictional doubts "can be overcome, if we apply the theory of positive obligations, because on that basis Italy is responsible for violation of its own obligation of prevention, irrespective of the conduct of another State (or non-State)." Liguori, *supra*, at p. 34.

*1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.*

*2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.*

*3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.*

279. Taken together, ASR Articles 40 and 41 confirm an obligation upon States to use lawful means to cooperate to bring to an end, and abstain from rendering aid or assistance to, any gross or systematic failure of another state, relating to a peremptory norm of general international law.

280. It is uncontroversial that the prohibition of torture is a peremptory norm of general international law and, as set out above, clear that migrants intercepted while crossing the Mediterranean and forced to return to Libya face being subjected to torture or other ill treatment.

281. It was stated by the UN Special Rapporteur on Extrajudicial, summary or arbitrary executions, that ASR Articles 40 and 41 may be triggered in respect of the treatment of migrants, and that the obligation upon other States to cooperate to bring such treatment to end, and abstain from rendering aid or assistance, would arise in this specific context.

282. In her report to the United Nations through the Secretary-General entitled “Unlawful death of refugees and migrants”, she stated that “to avoid mass migration across their borders, some States are relying on the policy of extraterritoriality to stop migrants before they reach their territory or come within their jurisdiction or control”.<sup>270</sup>

283. In relation to this practice of relying on a policy of extraterritoriality, she stated that this may trigger a breach of Articles 40 and 40 ASR:

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<sup>270</sup> Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Agnes Callamard, “Unlawful death of refugees and migrants”, submitted in accordance with Assembly resolution 71/198; <https://reliefweb.int/sites/reliefweb.int/files/resources/N1725806.pdf>.

*40. In some situations, disregard for the human rights of migrants may trigger concerns under articles 40 and 41 of the draft articles on responsibility of States for internationally wrongful acts: there is a “gross and systematic failure” by the responsible State to fulfil its obligation to protect life, and as a result, States must “cooperate to bring an end through lawful means” to this breach. In the face of gross, systemic failure of human rights, other States must not “render aid or assistance in maintaining that situation”. **Given the situation in some of these transit States and countries of origin, where migrants or refugees are subject to systemic abuse, it seems appropriate to call for destination States to stop providing funding and equipment for migration control** (our emphasis).<sup>271</sup>*

284. The gross violation of human rights committed in Libya may be qualified as crimes against humanity as envisaged by the Prosecutor of the International Criminal Court, who clarified on a number of occasions that the ongoing investigations relating to Libya (following a referral by the UN Security Council) also concern “serious and widespread crimes against migrants attempting to transit through Libya”.<sup>272</sup> This view is shared by the OHCHR and the UNSMIL in the reports detailing the extent of abuse suffered by migrants transiting through Libya, as set out in the facts above.

285. If it is accepted that the treatment of migrants transiting through Libya amounts to a “serious breach” within the meaning of ASR Article 40, then the obligation arises for Italy to cooperate in bringing the situation to an end and abstain from rendering aid or assistance to the Libyan authorities, as per ASR Article 41.

286. It is notable that Article 41 does not mention either knowledge or intention of the State carrying the obligation, and it is therefore irrelevant whether or not the Italian government’s stated purpose is to alleviate the suffering of migrants crossing the Mediterranean or something entirely different. The question of whether the Italian government is aiding or assisting the Libyan authorities in maintaining the serious breach is one that must be answered through an objective assessment of the facts.

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<sup>271</sup> Report of Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, *supra*, § 40.

<sup>272</sup> See Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) of 2 November 2018, para 15–16; of 8 May 2018, para.25–26; of 8 November 2017, para. 31; of 9 May 2017, para. 44, available at [www.icc-cpi.int](http://www.icc-cpi.int) See also Mann, Itamar, Moreno-Lax, Violeta, Shatz, Omer, “Time to Investigate European Agents for Crimes against Migrants in Libya”, in European Journal of International Law: Talk! , 29 March 2018, available at <https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/>

287. On this basis, it is clear that Italy is in breach of its obligations under ASR Article 40 and 41 for the following reasons:

- a. The abuse of migrants transiting through Libya is a ‘serious breach’ of a peremptory norm of general international law because it breaches the prohibition of torture: see Facts Section I.
- b. Italy has failed to cooperate in preventing the serious breach by omitting to:
  - i. Ensure that adequate safeguards are in place to prevent migrants from being exposed to a risk of torture or other ill treatment upon their return to Libya
  - ii. Ensure that the detention centres in Libya in which migrants are being detained are closed as a pre-condition to the implementation of the MoU
  - iii. Ensure that migrants are assessed for eligibility for refugee protection prior to their interception and forced return to Libya
  - iv. Ensure that child migrants departing from Libya are recognised and afforded the specific protection that they require prior to their interception and forced return to Libya
  - v. Ensure that migrants with specific physical and mental health needs are recognised and afforded the specific protection that they require prior to their interception and forced return to Libya.

See Facts Sections I, J and K for above points.

- c. Italy has provided aid and assistance in the commission of the serious breach by
  - i. Providing financial support to the LCG to intercept migrants departing from Libya
  - ii. Providing logistical and technological support to the LCG to facilitate the interceptions
  - iii. Providing equipment to the LCG to facilitate the interceptions

- iv. Criminalising independent search and rescue operations that seek to ensure rescue and disembarkation in a safe place.
- v. Providing financial support and training to the DCIM for the purpose of detaining refugees and migrants in formal and informal centres where they are known to be tortured.

See Facts Sections E, G, H, J and K for above points.

288. In considering whether the abuses suffered by migrants being intercepted and forcibly returned to Libya can be considered to be within the jurisdiction of Italy for the purpose of Article 20 CAT, it is relevant that, although the offences take place outside the geographical boundaries of Italy, Italy would nonetheless be accountable for the abuses through its breach of Articles 40 & 41 of ASR due to the rendering of aid and assistance to a serious breach of a peremptory norm of general international law.

289. Again, the word “territory” in the context of Article 20 CAT is a jurisdictional term which cannot be construed narrowly and in a vacuum of wider principles of international human rights law, but should reflect the principles within the ASR, that oblige states to take responsibility for human rights breaches even beyond their geographical boundaries.

## **ii. Article 16 ASR, complicity in torture<sup>273</sup>**

290. Apart from ASR Articles 40 & 41, the question of whether the torture of migrants intercepted by the LCG and returned to Libya can be considered the responsibility of Italy can be evaluated by reference to ASR Article 16, which states:

### **Article 16. Aid or assistance in the commission of an internationally wrongful act**

*A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*

- (a) *that State does so with knowledge of the circumstances of the internationally wrongful act; and*

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<sup>273</sup> For a helpful discussion comparing approaches based on positive obligations versus responsibility on account of complicity, see Liguori, *supra* at pp. 28 – 48.

(b) *the act would be internationally wrongful if committed by that State.*

291. In the Bosnian Genocide case, the ICJ held that responsibility for aid or assistance under Article 16 ASR is a rule of customary international law.<sup>274</sup> Specifically in the context of the externalization of border control.

292. The UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment has stated that “destination States cannot circumvent their own international obligations by externalizing or delegating their migration control practices to other States or non-State actors beyond their jurisdictional control; rather, **any instigation, support or participation on their part may give rise to complicity in or joint responsibility for unlawful pullback operations and the resulting human rights violations, including torture and ill-treatment.**”<sup>275</sup>

293. It is possible to consider ASR Article 16 through its four relevant components, (a) that a State provides “aid or assistance” (b) in the commission of an “internationally wrongful act”, (c) that the aid or assistance is given “with knowledge of the circumstances of the internationally wrongful act”, and (d) the act would be internationally wrongful if committed by that state.

294. In relation to (a), that a state provides “aid or assistance”, the International Law Commission has not specifically defined what is considered “aid and assistance”, but has clarified that “there is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to the act”.<sup>276</sup>

295. Italy has at the very least made significant contributions to Italy’s breach. With regards to pull-backs, an active involvement of the LCG in intercepting and taking refugees and migrants back to Libya would have been extremely unlikely without Italy’s support, since

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<sup>274</sup> “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)”, Judgment, ICJ Reports 2007, p. 43 (hereafter, Bosnian Genocide ) at para. 420.

<sup>275</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 November 2018, A/HRC/37/50 at § 57, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/347/27/PDF/G1834727.pdf?OpenElement>

<sup>276</sup> Page 66 Para 5 of ASR.



Libya had neither the means nor the will to do so without the logistics and financial aid provided by Italy.

296. In relation to (b), that there is commission of an “internationally wrongful act”, it is uncontroversial that the forced return of refugees and migrants to Libya upon being intercepted in the Mediterranean is an internationally wrongful act as it exposes them to a real risk of torture or ill treatment in Libya.

297. In *Hirsi*, the ECtHR considered the forcible return of migrants to Libya crossing the Mediterranean to be a breach of Article 3 ECHR.

298. In relation to (c), that the State provides the aid or assistance with knowledge of the circumstances of the internationally wrongful act, the ILC Commentary concerning mental state, provides that a State is not responsible unless it “intended ... to facilitate the occurrence of the wrongful conduct”. However, sub-paragraph (b) of Article 30(2) of the Statute to the International Criminal Court states that “A person has intent where: ... (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events”.

299. This provision illustrates an oblique form of intent, where a person does not have the desire or will to bring about the consequences, but is aware that those consequences will be the almost inevitable outcome of his or her acts or omissions.

300. Again, Italy is well aware of the circumstances that render Libya’s conduct internationally wrongful given the extensive evidence from the OCHCR and UNSMIL that have clearly demonstrated the risks for migrants, as well as the fact that Italy had already been condemned for the same violation by the ECtHR in the *Hirsi* case.

301. Finally, the requirement of (d) is that the act would be internationally wrongful if committed by that State. This is a reflection of the *pacta terti* principle that no state is bound by the obligations of another state vis-à-vis third states.<sup>277</sup> It is clear that the abuse suffered by intercepted migrants that are returned to Libya would be internationally wrongful if committed by Italy. Torture is prohibited both by a rule of customary international law and by treaties ratified by Italy and Libya (*inter alia* the CAT and the ICCPR) and Italy is signatory to the ECHR.

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<sup>277</sup> Vienna Convention on the Law of Treaties, arts. 34–35, May 23, 1969, 1155 U.N.T.S. 18232

302. In conclusion, all four elements of the criteria under ASR Article 16 concerning Italy's aid and assistance to Libya in the interception of migrants and their forced return to Libya are met. Again, while the abuse takes place outside the boundaries of Italy's sovereign space, through the application of ASR Article 16 there are clear indications that the abuse comes within the purview of Italian jurisdiction for the purpose of Article 20(1) of CAT.

#### **D. Defence Without Merit: Italy's replies to the UN Special Rapporteurs and Working Groups**

303. The role of Italy in the systematic torture of intercepted migrants departing from Libya has been criticised by several different United Nations Special Rapporteurs and Working Groups on several occasions. The Italian government has provided responses to these criticisms. They include:

a. Correspondence from Special Rapporteurs of 2 February 2017

From: The Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council.

Concerning: Negotiations between the Italian government and the Libyan GNA on the Memorandum of Understanding and the human rights impact on migrants.<sup>278</sup>

Date of response from Italian government: 21 February 2017<sup>279</sup>

b. Correspondence from Special Rapporteurs of 28 November 2017

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<sup>278</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22975>.

<sup>279</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=33391>.

From: Working Group of Experts on People of African Descent; Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; Special Rapporteur on minority issues; Independent Expert on human rights and international solidarity; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Special Rapporteur on trafficking in persons, especially women and children; and Special Rapporteur on violence against women, its causes and consequences.

Concerning: Completion and implementation of the Memorandum of Understanding and the human rights impact on migrants.<sup>280</sup>

Date of response from Italian government: 7 February 2018<sup>281</sup>

c. Correspondence from Special Rapporteurs of 15 May 2019

From: Special Rapporteur on the situation of human rights defenders; Independent Expert on human rights and international solidarity; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on trafficking in persons, especially women and children.

Concerning: The Italian Directive for the unified coordination of surveillance activities of maritime borders and fight against illegal immigration and its human rights impact on migrants and search and rescue operations in the Mediterranean.<sup>282</sup>

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<sup>280</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23486>.

<sup>281</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=33899>.

<sup>282</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24568>.

Date of response from Italian government: 4 June 2019<sup>283</sup>

304. There is a clear pattern within the responses to these criticisms in which the Italian government defends its role. In summary, Italy contends that, contrary to providing assistance to the systematic torture of intercepted migrants, the purpose and effect of its involvement is to benefit the migrants transiting through Libya. This defence is without merit for the reasons set out below.
305. There are a range of specific points made by the Italian authority in response to the communications made by the various Special Rapporteurs. The Italian government suggests that the collaboration with the Libyan authority is carried out with the intention of fighting against human trafficking networks, and that through ensuring that migrant vessels are intercepted by the Libyan authorities, such networks are being disrupted.
306. However, the evidence from the OHCHR and UNSMIL, as well as the research conducted by various NGOs concerned with international human rights, is that human trafficking is rife and that the Italian collaboration with the Libyan authorities has not diminished the prevalence of this activity.
307. On the contrary, as set out in the factual section above (see Facts Section F), there is evidence that human trafficking networks have infiltrated the Libyan authorities and take payment from migrants to bribe LCG and DCIM officials to ensure their passage over the Mediterranean.
308. One illustrative account concerned an individual migrant who paid a trafficking agent to be released from a detention centre and to be ensured permission to voyage across the Mediterranean only to be intercepted at sea by the same person who was actually a DCIM official.
309. This account is consistent with wider research indicating a complete lack of transparency relating to trafficking networks and the fact that the Libyan authorities, including the LCG and the DCIM are infiltrated by traffickers and other criminal gangs.

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<sup>283</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34729>.

310. Indeed, as set out in the Facts Sections F, there is clear evidence that a notorious human trafficking agent was present in direct discussions with the Italian government concerning the MoU and has since profited from the distribution of funds. The suggestion made by the Italian authority that the collaboration weakens human trafficking networks is therefore unsustainable.
311. Another point made by the Italian government is that “Libya will never become a stable country until it is able to effectively control its borders in line with the most advanced standards”<sup>284</sup> and that the MoU provides such assistance to the Libyan authorities to achieve this goal.
312. It is well established that Libya is not a “safe country” for the purpose of the 1951 Refugee Convention and that migrants are at a real risk of torture and other human rights abuses. The contention that migrants should be intercepted and returned to Libya while attempting to leave, for the benefit of assisting Libya in becoming a “stable country”, supposes posits the overall stability of Libya as a greater priority than the fundamental rights of the migrants.
313. This is an unsustainable rationale, firstly because the stability of Libya cannot be achieved at the cost of the fundamental rights of individuals transiting through and departing the country, and secondly because, as member states of the CAT, neither Italy nor Libya are permitted to justify subjecting migrants to torture on the grounds of achieving political aims. We recall that Article 2(2) of the CAT clarifies that the prohibition of torture is absolute and that “[n]o **exceptional circumstance whatsoever**, whether a state of war or a threat of war, internal political instability or any other public emergency, **may be invoked as a justification of torture.**”
314. In response to the Special Rapporteurs’ concerns regarding the negative outcomes of the MoU on the human rights of migrants, the Italian authorities rely on the wording of the MoU itself and reference Article 5 which states, “The Parties pledge to interpret and apply this Memorandum with due regard for the international obligations and agreements on human rights to which both countries are party”.<sup>285</sup>

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<sup>284</sup> Page 4 of 7 February 2018 document.

<sup>285</sup> Page 5 of 7 February 2018 document

315. Although the MoU states that it requires both parties to apply international obligations on human rights, it is clear that the Libyan authorities are consistently in breach of such obligations. The range of breaches of such obligations, as set out in the Facts Section I, include torture, rape, arbitrary detention, forced labour, sale to traffickers and extortion rackets.
316. The MoU contains no consequence for breach of such obligations, meaning there is no mechanism for enforcement of human rights obligations within the MoU. Despite evidence of such breaches, the Italian authorities renewed the MoU in February 2020, demonstrating that the requirement to have regard to international obligations on human rights is considered by the Italian authorities as discretionary. In any event, the human rights violations at issue posed no obstacle to the Italian authorities' willingness to continue providing support and assistance to Libya.
317. The Italian correspondence in response to the Special Rapporteurs' concerns also makes reference to the aid and assistance its officials have provided to the UNHCR in accessing 28 out of the 29 detention centres for migrants throughout Libya, which resulted in over 1000 vulnerable people being identified that could apply for international protection and be resettled to other countries.<sup>286</sup>
318. Although the assistance provided to migrants through the UNHCR is valuable, the continued operation of 29 detention centres in Libya contributes to the fundamental rights violations for thousands of migrants transiting through the country who have not received international protection. Italy's contributions to the UNHCR do not mitigate Italy's flagrant breaches of human rights in Libya.
319. In a letter addressed to the Minister of Foreign Affairs of Italy, Luigi Di Maio, published on 13 February 2020, the Council of Europe's (CoE) Commissioner for Human Rights urged the Italian government to introduce human rights safeguards in the Memorandum of Understanding between Italy and Libya, stating, "Given the safety situation in conflict-torn Libya at present and the great amount of evidence pointing to serious human rights violations faced by migrants and asylum seekers returned there, I call on your government

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<sup>286</sup> Page 5 of 7 February 2018 document

to suspend the co-operation activities in place with the Libyan Coast Guard that impact, directly or indirectly, on the return of persons intercepted at sea to Libya.”<sup>287</sup>

320. Despite this request from the CoE Commissioner to suspend co-operation, the Italian government nonetheless renewed its implementation of the MoU without additional conditions to guarantee the protection of migrants’ rights, or to enforce the closure of the detention camps.

321. The Italian government states that one of its purposes in agreeing and implementing the MoU is to give effect to its obligation to impose “effective, proportionate and dissuasive” sanctions for unauthorized crossings of external borders as part of its responsibilities as a member of the Schengen border area under Article 5 of the Schengen Borders Code Regulations (Regulation (EU) 2016/299).<sup>288</sup>

322. However, given the abundance of evidence that Libya is not a “safe country”, it is apparent that the Italian cooperation in ensuring migrants are returned to Libya is not a “proportionate” means of effective border control. This is especially the case after the CoE Commissioner of Human Rights’ recent request for collaboration to be suspended in light of these human rights violations and the IOM’s urgent request of 19 February 2020<sup>289</sup> in which it called for the international community, including the European Union, to find alternative disembarkation mechanisms for migrants fleeing from Libya.

323. It should also be noted that the Schengen Borders Code Regulations (Regulation (EU) 2016/299) also confers on states the responsibility to ensure that human dignity is safeguarded in the implementation of border control. As such, although Italy carries a responsibility to have effective immigration control, the implementation of the MoU with Libya is neither a proportionate nor legal means of fulfilling this duty.

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<sup>287</sup> European Council Commissioner’s letter to Luigi di Maio, Minister of Foreign Affairs, 13 February 2020; <https://rm.coe.int/letter-to-mr-luigi-di-maio-minister-of-foreign-affairs-and-international/16809c8262>.

<sup>288</sup> Page 3 of the 4 June 2019 document.

<sup>289</sup> IOM, “IOM Calls on the International Community for Urgent Action to Find Alternatives to Disembarkation in Libya”, 19 February 2020; [https://www.iom.int/news/iom-calls-international-community-urgent-action-find-alternatives-disembarkation-libya?utm\\_source=IOM+External+Mailing+List&utm\\_campaign=bbbd644850-EMAIL\\_CAMPAIGN\\_2020\\_02\\_19\\_01\\_34&utm\\_medium=email&utm\\_term=0\\_9968056566-bbbd644850-](https://www.iom.int/news/iom-calls-international-community-urgent-action-find-alternatives-disembarkation-libya?utm_source=IOM+External+Mailing+List&utm_campaign=bbbd644850-EMAIL_CAMPAIGN_2020_02_19_01_34&utm_medium=email&utm_term=0_9968056566-bbbd644850-)

324. Finally, throughout the responses to the Special Rapporteurs, the Italian government consistently states that the protection of life is its main objective and that its initiatives have contributed to a reduction of deaths at sea.<sup>290</sup>
325. The suggestion that the primary concern of the Italian government is to protect life is plainly at odds with the criminalisation and disruption of independent search and rescue operations, as set out in the Facts, Section H.
326. In contrast to Italy's previous Mare Nostrum operations, the MoU with Libya does not have the saving of lives as its primary objective. Indeed, it is clear from the MoU that the main concern is to prevent people from crossing for the purpose of border control. In any event, the result of the interceptions made by the LCG is that migrants are returned to Libya to face a risk of torture and other ill-treatment, and the breach of these fundamental rights is not a sustainable response to the problem of deaths at sea.
327. In conclusion, the MoU between Italy and Libya and the Italian role in aiding and assisting the LCG, has been consistently condemned by a wide range of United Nations Special Rapporteurs concerned with human rights.
328. In considering the present request to initiate an inquiry under the Article 20 CAT procedure, we ask the Committee take note of the Special Rapporteurs' communications with Italy and in particular, the latter's refusal to adequately respond to the criticisms levelled against it with respect to the human rights of refugees and migrants.

## CONCLUSION

329. In our submission we have argued that Italy's strategy of outsourcing coercive migration control to the Libyan Coast Guard (LCG) breaches Italy's commitments under the CAT.
330. We have demonstrated that by pulling back migrants, the LCG is acting on Italy's behalf. Specifically, it is operating due to Italy's comprehensive material and logistical

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<sup>290</sup> Page 3 of the 4 June 2019 document.



support which includes funds, ships, training, and command and control structures. Real-time naval and aerial surveillance in the Central Mediterranean is provided by Italy directly and through EU programmes in which Italy plays a primary role. Cooperation between Italy and Libya is governed by a MoU signed in 2017 and renewed without modification in 2020, whose stated purpose is to “stem illegal migration” through the provision of Italian resources to “the Libyan institutions in charge of the fight against illegal immigration” such as the “coast guard” (MoU Article 1).

331. Without these resources, the LCG would not be able or willing to intercept migrant boats, or even to locate them in its own SAR zone. By means of this cooperation, Italy has entirely externalized its border control to Libya. This has led to the interception and forced return of an estimated 50’000 persons to Libyan detention centres where they are systematically tortured.
332. The shift from “push-backs” – involving Italy’s own navy and which were declared illegal by the ECtHR in the *Hirsi Jamaa* judgment – to “pull-backs”, where Italy outsources the very same activity to the Libyans, constitutes a blatant attempt to avoid accountability under human rights law.
333. However, as we demonstrated in our submission, Italy’s involvement with the LCG is so comprehensive, that Italy has itself become responsible for the LCG’s conduct under applicable principles of international law. Because of Italy’s decisive role over all aspects of Libya’s interdiction programme, Italy is exercising *de facto* control over migrants in the Central Mediterranean and its actions therefore come within the jurisdictional scope of the CAT to which Italy is a party.
334. The Committee is charged with supervising state compliance with the CAT including by opening a formal inquiry procedure under Article 20 concerning situations which reveal a systematic practice of torture.
335. In light of the information submitted, we urge the Committee to start an investigation that will establish the facts and the legal responsibilities of Italy, and recommend the immediate cessation of all collaboration with Libyan migration authorities implicated in abuses of refugees and migrants.

